Supreme Court, U.S.
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No.

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG,
TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
1880 S. Redwood Street
Escondido, CA 92025
(760) 737-7181

ALAN UNTEREINER*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
BRIAN WILLEN
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

Counsel for Petitioners

QUESTIONS PRESENTED

In *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court reversed a decision of the Seventh Circuit that had affirmed a civil judgment and nationwide injunction entered under the Racketeer Influenced and Corrupt Organizations Act (RICO) against various anti-abortion protesters. In reversing, this Court explained (*id.* at 411 (emphasis added in part)): "Because *all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed, the judgment* that petitioners violated RICO *must also be reversed.* Without an underlying RICO violation, the *injunction* issued by the District Court *must necessarily be vacated.*" On that basis, this Court determined that it "need not address the second question" on which certiorari had been granted, namely "whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." *Ibid.*

The questions presented are:

1. Whether the Seventh Circuit, on remand, disregarded this Court's mandate by holding that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the "injunction issued by the District Court" might *not* need to be vacated.

2. Whether the Seventh Circuit correctly held, in conflict with decisions of the Sixth and Ninth Circuits, that the Hobbs Act, 18 U.S.C. § 1951(a), can be read to punish acts or threats of physical violence against "any person or property" in a manner that "in any way or degree * * * affects commerce," even if such acts or threats of violence are wholly unconnected to either extortion or robbery.

3. Whether this Court should again grant certiorari to resolve the deep and important intercircuit conflict over whether injunctive relief is available in a private civil action for treble damages brought under RICO, 18 U.S.C. § 1964(c).

RULE 14.1(b) AND 29.6 STATEMENT

Respondent National Organization for Women, Inc. (NOW), is a party to this action on behalf of itself as well as its women members and all other women whose freedom to use the services of women's health centers in the United States that provide abortions has been or will be interfered with by unlawful activities of the petitioners. Other respondents here (plaintiffs below) are the Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., which appear on their own behalf as well as on behalf of a class of all women's health centers in the United States at which abortions are performed. Operation Rescue, a defendant below, is a respondent under S. Ct. Rule 12.6.

Petitioner Pro-Life Action League, Inc., has no parent corporation and does not issue stock to the public.

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OPINIONS BELOW

The opinion of the court of appeals denying rehearing (App., *infra*, 1a-24a) is reported at 396 F.3d 807. The previous order of the court of appeals on remand (App., *infra*, 25a-29a) from this Court is unreported. The earlier opinion of the court of appeals (App., *infra*, 30a-61a), which this Court reversed, is reported at 267 F.3d 687. The district court's opinion disposing of the motion to dismiss the third amended complaint (App., *infra*, 62a-140a) is reported at 897 F. Supp. 1047. The district court's opinion denying post-trial motions and entering an injunction (App., *infra*, 141a-174a) is unreported.

JURISDICTION

The court of appeals entered its order on remand on February 26, 2004, and denied rehearing on January 28, 2005. App., *infra*, 1a, 25a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This Court's jurisdiction to review the first issue presented is also invoked under 28 U.S.C. § 1651.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Hobbs Act, 18 U.S.C. § 1951, and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, are set forth at App., *infra*, 175a-177a.

STATEMENT

This truly is a case of "déjà vu all over again." More than two years ago, this Court issued its second decision in this long-running litigation involving the controversial use of civil RICO against individuals and organizations engaged in vigorous protests against abortion clinics. *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003) (*Scheidler II*); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*Scheidler I*). In *Scheidler II*, the Court to all appearances brought this case to an end by holding that the

political protesters' mere interference with others' property or liberty interests, without any showing of wrongful "obtaining" of another's "property," does not constitute extortion in violation of the Hobbs Act. The Court therefore reversed the judgment of RICO liability, which had rested on 121 purported predicate acts, including violations (and attempted violations) of the Hobbs Act, the Travel Act, and state extortion law. 537 U.S. at 397. The Court explained that its "determination with respect to extortion under the Hobbs Act" "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Ibid.* "Because *all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," the Court instructed, "the *judgment* that petitioners violated RICO *must also be reversed*" and the injunction "*must necessarily be vacated.*" *Id.* at 411 (emphasis added).

On remand, a panel has ruled that, notwithstanding this Court's directives, "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, the RICO judgment was *not* necessarily reversed, and the injunction issued by the district court might *not* need to be vacated after all. The panel also concluded, for good measure, that the Hobbs Act might well criminalize the protesters' activities. Accordingly, the panel remanded the case to the district court to determine whether four predicate acts that the panel viewed as unaffected by this Court's decision could provide a basis for maintaining a RICO injunction against the protesters. App., *infra*, 7a-8a, 15a-16a, 28a-29a. Further review is warranted to bring the Seventh Circuit into compliance with this Court's mandate as well as to resolve significant conflicts on several of the issues presented.

A. Factual and Procedural Background

1. Petitioners Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are individuals who oppose abortion on moral and religious grounds. Petitioner Pro-Life Action League, Inc. (PLAL), is a nonprofit Illinois corporation. Respondents the

National Organization for Women, Inc. (NOW), Delaware Women's Health Organization, Inc. (DWHO), and Summit Women's Health Organization, Inc. (Summit) are, respectively, a national nonprofit organization that supports the legal availability of abortion and two affiliated clinics that perform abortions.

Some 19 years ago, respondents initiated this lawsuit against petitioners and various other individuals and entities.[1] Respondents asserted claims on behalf of two putative nationwide classes: all women's health centers at which abortions are performed (represented by DWHO and Summit); and non-NOW members whose freedom to use the services of such abortion clinics has been or will be interfered with by the unlawful activities of petitioners (represented by NOW). NOW also claimed organizational standing to advance similar claims for its own members. Respondents alleged, among other things, violations of RICO and of state law.

In their RICO claims, respondents alleged that petitioners and Operation Rescue had formed a loose association-in-fact of individuals and groups known as the Pro-Life Action Network (PLAN), united by a common ideological purpose of opposing abortion. They further alleged that PLAN was a RICO "enterprise" and that petitioners, by engaging in protests aimed at closing abortion clinics, had directly or indirectly participated in the conduct of PLAN's activities through a "pattern" of "racketeering activity" (18 U.S.C. § 1962(c)) that included acts of "extortion" in violation of the Hobbs Act, 18 U.S.C. § 1951. Respondents requested treble damages, costs, attorneys' fees, and (under the antitrust laws but not under RICO) an injunction.

In 1991, the district court dismissed the complaint for failure to state a valid claim, 765 F. Supp. 937, and the Seventh Circuit affirmed, 968 F.2d 612 (1992). In upholding the

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[1] Except for Operation Rescue, all of the other individuals and entities ceased to be defendants before trial. See also page ii, *supra*. References to "respondents" throughout this brief do not include Operation Rescue.

dismissal of the RICO claims, the court of appeals held that RICO does not apply to defendants who commit "non-economic crimes * * * in furtherance of non-economic motives." *Id.* at 629. This Court granted certiorari on the "economic motive" issue, 508 U.S. 971 (1993), and reversed, 510 U.S. 249 (1994).

2. Following remand to the trial court, respondents filed a third amended complaint. For the first time, they requested injunctive relief under RICO. In 1995, the trial court dismissed the claims against certain defendants, but not the remaining RICO claims against petitioners. App., *infra*, 140a. The court also held that respondents, as private parties, could obtain injunctive relief in a treble-damages action brought under RICO, 18 U.S.C. § 1964(c). App., *infra*, 119a-122a.

3. The case was tried from March 4 to April 20, 1998. Evidence was presented concerning numerous incidents spanning the nationwide conduct of petitioners and thousands of other abortion protesters over a 15-year period. App., *infra*, 33a ("hundreds of acts"). The jury returned a verdict for respondents on their RICO claim under Section 1962(c).

The jury found, among other things, that petitioners and Operation Rescue or unnamed persons "associated with PLAN" had committed 121 predicate acts under RICO: 21 "[a]cts or threats involving extortion against a[] patient, prospective patient, doctor, nurse, or clinic employee" in violation of the Hobbs Act, 18 U.S.C. § 1951; 25 violations of state extortion law (defined in essentially the same way as Hobbs Act extortion); 25 acts of conspiracy to violate federal or state extortion law; 23 extortion-related violations of the Travel Act, see 18 U.S.C. §§ 1952(b), 1961(1)(A); 23 attempts to violate the Travel Act; and 4 acts or threats of physical violence to any person or property in violation of the Hobbs Act, 18 U.S.C. § 1951.[2]

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[2] The jury instructions defined "property" broadly for purposes of all of the Hobbs Act counts to include "anything of value, including a woman's right to seek services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to

The jury awarded $31,455.64 to DWHO in damages and $54,471.28 to Summit; pursuant to RICO, the damages were trebled. The court later denied post-trial motions and entered a broad nationwide injunction regulating petitioners' future protest activities at abortion clinics. App., *infra*, 141a-174a.

4. The Seventh Circuit affirmed. App., *infra*, 30a-61a. In holding that injunctive relief is available to a private litigant suing under RICO, the court openly disagreed with the Ninth Circuit. *Id.* at 35a-43a. The court also rejected petitioners' arguments that they could not have violated the Hobbs Act because, among other things, they had not "obtained" any "property" of the clinics, the doctors who worked there, or the clinics' customers. *Id.* at 58a-59a. The court asserted that the clinics' "intangible property * * * right to conduct a business" was "'property' under the Hobbs Act" and "[a] loss to, or interference with the rights of, the victim is all that is required." *Id.* at 59a (internal quotations omitted).

B. This Court's Decision in *Scheidler II*

This Court reversed, holding that petitioners' actions did not constitute extortion within the meaning of the Hobbs Act because petitioners had not wrongfully "obtained" any "property" as required by 18 U.S.C. § 1951(b)(2). 537 U.S. at 402. The Court noted that the Hobbs Act drew its definition of extortion from the Penal Code of New York and the Field Code, a 19th-century model penal code. *Id.* at 403. Under New York law, "obtaining" property required both a deprivation and an acquisition of property. *Id.* at 403-04. The Court rejected the argument that "merely interfering with or depriving someone of property is sufficient to constitute extortion." *Id.* at 405.

A contrary holding, the Court emphasized, would impermissibly extend the Hobbs Act to the separate crime of coercion, which "involves the use of force or threat of force to re-

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provide medical services free from wrongful threats, violence, coercion, and fear." App., *infra*, 182a. The relevant jury instructions, as well as the special verdict form, are reprinted at App., *infra*, 178a-195a.

strict another's freedom of action." 537 U.S. at 405. New York law had clearly established coercion as a separate and lesser offense from extortion, and the legislative history of the Hobbs Act showed that Congress "deci[ded] * * * to omit coercion" from the scope of the Hobbs Act. *Id.* at 406, 408. That decision – along with the rule of lenity – required reading the statute not to cover activity that would merely have constituted coercion. *Id.* at 409.[3]

The Court then rejected all of the other predicate acts that had served as the basis for the RICO violation and the nationwide injunction. The Court ruled that the state-law extortion counts were legally defective, as were the 46 violations and attempted violations of the Travel Act. 537 U.S. at 409-10. The Court concluded that "*all* of the predicate acts supporting the jury's finding of a RICO violation must be reversed," and that, therefore, the RICO "judgment * * * must also be reversed" and the injunction "must necessarily be vacated." *Id.* at 411 (emphasis added). With no legal basis for a RICO injunction, the Court stated that it "need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964." *Ibid.*

C. The Seventh Circuit's Decision on Remand

1. One year after this Court's decision, the court of appeals on remand entered an unpublished order. App., *infra*, 25a-29a. The Seventh Circuit panel held that this Court's decision left undisturbed four predicate acts found by the jury – those involving "acts or threats of physical violence to any person or property" in purported violation of the Hobbs Act. In the panel's view, this Court could not "have found these four predicate acts insufficient to support the district court's injunction," because the

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[3] The Court set forth the definition of coercion under New York law at 537 U.S. at 405 n.10. Coercion included the wrongful use of "violence" or "threat[s]" of violence against "any other person" or "his property," if such actions were undertaken "with a view to compel another person to do or to abstain from doing an act which such other person has a legal right to do or to abstain from doing." New York Penal Law § 530 (1909).

only question the Court accepted for review with respect to the Hobbs Act was "'whether petitioners committed extortion within the meaning of the Hobbs Act.'" App., *infra*, 28a (quoting 537 U.S. at 397).

The panel concluded that it was possible that the four supposedly surviving predicate acts might be "sufficient to support the nationwide injunction," and remanded that issue to the district court. App., *infra*, 28a. The panel did not explain how its remand instructions could be reconciled with this Court's statements that the injunction "must necessarily be vacated" and that the underlying RICO judgment "must also be reversed." 537 U.S. at 411. On remand, the panel noted, the district court "may need to determine whether the phrase 'commits or threatens physical violence to any person or property' constitutes an independent ground for violating the Hobbs Act or, rather relates back to the grounds of robbery or extortion." App., *infra*, 29a.

2. Petitioners sought panel and en banc rehearing, arguing, among other things, that the order on remand was squarely at odds with this Court's unambiguous mandate in *Scheidler II*, that this Court *did* resolve the legality of the four Hobbs Act predicates, and that, in the alternative, the panel should decide whether the Hobbs Act reaches freestanding acts or threats of violence to property or persons, unconnected to extortion or robbery (an issue that was briefed to the same panel in the prior appeal). But cf. App., *infra*, 6a (suggesting, incorrectly, that petitioners were seeking rehearing on the ground that the panel's remand order had "implicit[ly] resol[ved]" the Hobbs Act issue). No appellate court in the 58 years since the Hobbs Act was enacted, petitioners explained, has interpreted the statute as punishing freestanding acts or threats of violence to persons or property – and the Ninth Circuit has categorically rejected this reading as "fatally flawed" and utterly "without merit." *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (1999). Petitioners also requested en banc consideration of this issue, noting that, if the panel decided that the Hobbs Act punishes freestanding acts or threats of violence, that would

place it in direct conflict with the Ninth Circuit. Finally, petitioners sought en banc consideration of the panel's prior holding, in conflict with other circuits, that injunctive relief is available to private parties under RICO.

3. On January 28, 2005, panel and en banc rehearing were denied over three dissenting votes. App., *infra*, 1a-24a. The panel offered no further explanation concerning how its remand order could be reconciled with this Court's remand instructions in *Scheidler II*. The panel stated that it had "nothing to add on that point to what we have already written," except to reiterate that this Court could not have reached these four counts because "they were not included in the petitions for *certiorari*." App., *infra*, 7a. Instead, the new opinion primarily addressed "whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO." *Id.* at 7a-8a. Although the panel purported not to resolve that issue conclusively ("for reasons of judicial economy and restraint"), it nonetheless devoted ten full pages to addressing – and criticizing – many of the arguments made in the rehearing petition for why the Hobbs Act cannot and should not be read to punish freestanding acts or threats of violence. *Id.* at 6a-15a.

Among other things, the panel suggested that the language of the Hobbs Act is ambiguous (App., *infra*, 8a):

> Whoever in any way or degree [1] obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or [2] attempts or conspires so to do, or [3] commits or threatens physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section* shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). "[T]here are two possible interpretations" of the third clause, the panel stated, and "[t]he choice between [them] * * * is not obvious." App., *infra*, 8a. Rejecting petitioners' argument, the panel stated that, "[g]rammatically, the text can be read either way without undue

strain." *Ibid.* Later in its opinion, the panel went even further, suggesting that reading the third clause as punishing freestanding acts or threats of violence would be to "take it at face value." *Id.* at 15a.[4]

Next, the panel observed that "there is no decisional law that sheds light on which of the two readings is to be preferred." App., *infra*, 8a. Yet the panel then quoted a sentence from *Stirone* v. *United States*, 361 U.S. 212 (1960), which observed that the Hobbs Act "speaks in broad language, manifesting a purpose to *use all the constitutional power Congress has* to punish interference with interstate commerce by extortion, robbery *or physical violence*." *Id.* at 215 (emphasis added). According to the panel, the quoted sentence "suggests that the Court saw three distinct types of predicate acts in the statute." App., *infra*, 8a. The panel later acknowledged that "the Sixth and Ninth Circuits have both" squarely held that the Hobbs Act does *not* reach freestanding acts or threats of violence. App., *infra*, 11a (citing *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975), and *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999)). But the panel claimed a conflict between those decisions and the unpublished opinion in *United States* v. *Milton*, 1998 WL 468812 (4th Cir. Aug. 4, 1998).

Finally, the panel turned to the "legislative history." App., *infra*,15a. The panel acknowledged that the Hobbs Act, as enacted in 1946, "*explicitly linked* the 'acts of physical violence' clause to the prohibition on robbery and extortion." *Ibid.* (emphasis added). Indeed, the Hobbs Act as enacted could hardly have been clearer on this point:

> SEC 2. Whoever in any way or degree obstructs, delays, or affects commerce, or the movement of any article or

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[4] The panel also suggested that limiting criminal liability under the Hobbs Act to acts or threats of physical violence "in furtherance of a plan or purpose to do anything in violation of" Section 1951 would violate the "well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless." App., *infra*,14a. The panel brushed aside or ignored petitioners' contrary arguments.

> commodity in commerce, by robbery or extortion, shall be guilty of a felony.
>
> SEC 3. Whoever conspires with another or with others, or acts in concert with another or with others to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC 4. Whoever attempts or participates in an attempt to do anything in violation of section 2 shall be guilty of a felony.
>
> SEC 5. Whoever commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of section 2* shall be guilty of a felony.

Pub. L. No. 486, 60 Stat. 420 (1946) (emphasis added). According to the panel, however, when Congress in 1948 approved a general revision and codification of the entirety of Title 18, it may have altered the Hobbs Act by expanding it to cover freestanding acts or threats of violence. Although the panel acknowledged that the 1948 "revisions were intended to be formal, stylistic changes," it went on to suggest that "it is not beyond the realm of possibility that the revisers may have made certain substantive changes, either advertently or inadvertently." App., *infra*, 15a.

Despite its detailed discussion of the Hobbs Act's meaning, the panel insisted that "it would be imprudent to resolve this problem of statutory interpretation at this stage" (19 years into this litigation) and therefore – "for reasons of judicial economy and restraint" – it "prefer[red] a wait-and-see approach." App., *infra*, 6a-7a, 15a-16a. The panel also said it might be unnecessary for the district court to resolve the Hobbs Act issue. *Id.* at 7a-8a, 16a. "[O]nly if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury," the panel said, will that court "have to confront" the Hobbs Act question. *Id.* at 7a.

4. Judge Manion, joined by Judge Kanne, dissented from the denial of rehearing en banc. App., *infra*,17a-24a.[5] In the dissenters' view, the panel's decision "directly conflicts with the Supreme Court's opinion," "rests on an impermissible reading of the Hobbs Act, and unnecessarily revives a case that is already more than eighteen years old." App., *infra*,19a. The dissenters pointed out that the panel's conclusion that certain RICO predicates and the injunction might remain tenable was flatly inconsistent with *Scheidler II*'s unambiguous language and with this Court's conclusion that it need not address the availability of private RICO injunctions.

Moreover, even if "the panel's remand order could be labeled a reasonable interpretation of the Supreme Court's opinion, the four predicate acts of violence to persons or property cannot, as a matter of law, constitute a violation of the Hobbs Act." App., *infra*, 21a. "Clearly," the dissenters explained, "under the Hobbs Act, physical violence to any person or property is confined to furthering robbery or extortion. It does not stand alone as a separate violation." *Id.* at 23a-24a. This straightforward reading explains why this Court's conclusion that petitioners had not committed extortion within the meaning of the Hobbs Act ended the case: "the Supreme Court's holding that there was no extortion means that no Hobbs Act violation possibly exists." *Id.* at 24a. Finally, the dissenters faulted the panel for purporting not to decide the Hobbs Act issue while simultaneously criticizing petitioners' arguments. *Id.* at 23a.

REASONS FOR GRANTING THE PETITION

As this case returns to the Court, it presents three issues that satisfy the traditional criteria for this Court's review. First, the case involves a lower court's flagrant disregard of this Court's unambiguous mandate in *Scheidler II*. Second, it raises a significant question about the meaning of the Hobbs Act (an issue on which the Seventh Circuit's ruling is irreconcilable with

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[5] Chief Judge Flaum also voted to grant rehearing en banc, but he did not join the dissenting opinion.

decisions of the Sixth and Ninth Circuits). Third, the panel's decision has resuscitated the important and recurring issue of the availability of private injunctive relief under RICO, a question on which this Court previously granted certiorari. Each of these issues provides an independent reason for a grant of certiorari, and the first two warrant summary reversal.

I. Certiorari Or Mandamus Is Warranted Because The Seventh Circuit's Decision Is Contrary To This Court's Clear Mandate

In reversing the Seventh Circuit's decision, this Court unambiguously stated (537 U.S. at 411 (emphasis added in part)):

> Because *all of the predicate acts* supporting the jury's finding of a RICO violation *must be reversed, the judgment that petitioners violated RICO must also be reversed.* Without an underlying RICO violation, the *injunction* issued by the District Court *must necessarily be vacated.* We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964.

In direct contradiction, the Seventh Circuit has now decided that "all" of the predicate acts supporting the jury's finding of a RICO violation were *not* reversed, that the "judgment that petitioners violated RICO" was *not* necessarily reversed, and that the injunction might *not* need to be vacated after all.

A. This extraordinary conclusion warrants review – and summary reversal – because, as the dissenting judges below observed it "directly conflicts" with this Court's instructions. App., *infra*, 19a (dissenting opinion); *id.* at 17a ("I believe that the Supreme Court meant what it said"). Neither can the panel's decision be reconciled with this Court's description of its holding: "We further *hold* that our determination with respect to extortion under the Hobbs Act *renders insufficient the other bases or predicate acts of racketeering* supporting the jury's conclusion that petitioners violated RICO." 537 U.S. at 397 (emphasis added). The Seventh Circuit also disregarded this

Court's decision *not* to address the question concerning the availability of private RICO injunctions on which review had been granted. That decision necessarily rested on a determination that the underlying RICO judgment was no longer valid.

The panel simply was not free to conclude that "the other bases or predicate acts" might be sufficient, after all, to support the injunction (which necessarily rested on the jury's invalidated "conclusion that [petitioners] violated RICO"). See App., *infra*, 17a-19a (dissenting opinion); *id.* at 20a (this Court's "unequivocal holding negates any reasonable inference that those four predicate acts remain an issue"). As this Court long ago explained, a court of appeals

> is bound by the [Supreme Court's] decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded. If the circuit court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal * * * or by a writ of mandamus to execute the mandate of this court.

In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (citations omitted); see also *Baltimore & Ohio R.R.* v. *United States*, 279 U.S. 781, 784-85 (1929). Because the panel failed to follow this Court's mandate, summary reversal is warranted. See *id.* at 785 ("It is well understood that this court has power to do all that is necessary to give effect [to] its judgments.").[6]

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[6] As *Sanford* and *Baltimore & Ohio R.R.* indicate, when an order issued by a lower court that takes the form of an appealable order fails to comply with this Court's mandate, "the aggrieved parties may file the ordinary petition for certiorari." R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE 585 (8th ed. 2002). Because the present case was "in the court of appeals," it clearly falls within the Court's certiorari jurisdiction under 28 U.S.C. § 1254(1). See *Hohn* v.

As the dissenting judges correctly noted below, if there was any ambiguity in this Court's opinion (and there is none), the proper course for respondents would have been "to seek rehearing from the Supreme Court." App., *infra*, 21a (dissenting opinion). Cf. *Parks* v. *Simpson Timber Co.*, 389 U.S. 909 (1967); *Union Trust Co.* v. *Eastern Air Lines, Inc.*, 350 U.S. 962 (1956). This they failed to do – no doubt because they knew what the answer would be.

B. In any event, the reasons the panel gave for refusing to follow this Court's mandate do not withstand scrutiny. According to the panel, the *Scheidler II* "opinion did not address the legal implications of the remaining four acts of physical violence. Indeed, any reader will see that the Court had nothing at all to say about them, for the understandable reason that they were not included in the petitions for *certiorari*." App., *infra*, 7a. Citing this Court's Rule 14.1(a) and its "general refusal to decide issues outside the question presented," the panel declared itself unwilling to "presume that in this case [the Court] went beyond the scope of its grant of certiorari * * * to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction." App., *infra*, 28a.

That reasoning is flawed at every turn. To begin with, as just explained, there is nothing "*sub silentio*" about this Court's

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United States, 524 U.S. 236, 241-42 (1998). There is thus no jurisdictional impediment to bringing the Seventh Circuit into compliance with the mandate of *Scheidler II* by granting certiorari and reversing the court of appeals' judgment. See *Perkins* v. *Fourniquet*, 55 U.S. 328, 330 (1852). In an abundance of caution, however, petitioners also request (in the alternative) that the Court, if necessary, construe this petition as one for a writ of mandamus under 28 U.S.C. § 1651. See *United States* v. *Fossatt*, 62 U.S. 445, 446 (1858) ("And if the court does not proceed to execute the mandate, or disobeys and mistakes its meaning, the party aggrieved may, by motion for a mandamus, at any time, bring the errors or omissions of the inferior court before this court for correction."); STERN ET AL., SUPREME COURT PRACTICE, *supra*, at 585 ("One function of the writ of mandamus is to force a lower court to comply with the mandate of an appellate court.").

opinion or the instructions and holding quoted above. To the contrary, the Court was quite explicit in invalidating *all* of the predicate acts, as well as the RICO judgment and the injunction. There is no ambiguity in this Court's statement that "all" – not "some" or "most" – of the RICO predicates had to be reversed. 537 U.S. at 411. And there is neither need nor reason to "presume" that this Court did not mean exactly what it said.

Equally mistaken was the panel's suggestion that the four acts of violence were *not* included in the petitions for certiorari. On the contrary, both of the petitions for certiorari expressly referred to the four predicate acts involving "acts or threats of physical violence to any person or property in violation of the Hobbs Act." 01-1118 Pet. 5 n.3; see also 01-1119 Pet. 3-4 & nn.3-5. Indeed, the significance and status of these four predicate acts were debated by the parties at the petition stage, with respondents arguing that this Court should deny review of the Hobbs Act question because the jury found "4 violations of the Hobbs Act through acts or threats of physical violence," those predicate acts were "unchallenged" in the Supreme Court, and the case therefore was "an inappropriate vehicle for determining whether the Seventh Circuit's construction of the Hobbs Act was correct." 01-1118 and 01-1119 Br. in Opp. 5, 15. In response, petitioners argued, among other things, that "*all* of the other predicate acts found by the jury" required "a showing of either 'robbery' (not alleged here) or 'extortion,'" because the Hobbs Act by its plain terms criminalizes acts or threats of violence *only* if they are committed "in furtherance of a plan or purpose" to violate Section 1951. 01-1118 Cert. Reply Br. 7-8 & n.11 (emphasis added) (citing *United States* v. *Yankowski*, 184 F.3d 1071, 1073-74 (9th Cir. 1999)); accord 01-1119 Cert. Reply Br. 7 & n.13. Moreover, the Seventh Circuit's overbroad definition of "property" – which petitioners cited as a principal reason for granting review of the Hobbs Act issue (01-1118 Pet. 17-19) – applied with equal force to the four predicates involving acts or threats of violence against "property" or persons. Thus, petitioners took the position that these four

predicate acts *were* "fairly included" (S. Ct. Rule 14.1(a)) within the Hobbs Act question presented.

This Court granted review of the Hobbs Act question over respondents' objections, see 535 U.S. 1016 (2002). At the merits stage, respondents shifted gears and made a strategic decision to *ignore* these four Hobbs Act predicates. Thus, although respondents included a detailed argument that the RICO judgment was valid and should be upheld "even apart from the Hobbs Act predicates," they pointedly did *not* argue that the judgment could stand because the jury found four Hobbs Act violations not involving extortion. 01-1118 and 01-1119 Resp. Merits Br. 33-35; App., *infra*, 21a (dissent). Indeed, respondents went further in order to address the jury's failure to specify which two or more of the 121 predicate acts constituted the requisite "pattern" of racketeering activity. Faced with that problem, respondents argued that the RICO judgment could stand "even apart from the Hobbs Act predicates" because "*all* of the acts that supported the jury's finding as to Hobbs Act violations *also* supported its findings as to state law [extortion] violations" (so that "the jury unquestionably would have found a pattern if only state extortion were at issue"). 01-1118 and 01-1119 Resp. Merits Br. 35. That argument, of course, *presupposed* that the four acts or threats of violence *were in fact related to extortion.*

Respondents' strategy helps explain why the Court in *Scheidler II* saw no need to state expressly that its resolution of the extortion issue also rendered the four violence counts legally insufficient. The Court quite properly would have assumed that the issue was simply no longer in dispute. See App., *infra*, 21a (dissent) (because respondents at merits stage "did not argue that the four predicate acts of violence * * * independently justified the jury's verdict, * * * the Supreme Court found no need to expressly address that question").

Moreover, even if the Hobbs Act question cannot be read as "fairly including" the four predicates at issue, the panel was wrong to rest on a presumption that this Court did not go

"beyond the scope of its grant of certiorari." App., *infra*, 28a. It is *undeniable* that this Court *did* go beyond the scope of its grant of certiorari in *Scheidler II* – by resolving the legality of the state-law extortion counts. Notably, the validity of the state-law extortion counts was raised as a *separate* issue in Operation Rescue's petition for certiorari, but the Court did not grant that issue. See 01-1119 Cert. Pet. i; 535 U.S. 1016 (2002) (order limiting grant of certiorari). The Court nonetheless reached and resolved that issue, holding that the state-law extortion counts were legally defective.

Nor is this surprising. As the panel acknowledged (App., *infra*, 28a), this Court's usual practice of deciding only the issues presented and those issues "fairly included" therein (S. Ct. Rule 14.1(a)) is not a "jurisdictional or absolute" limit on the Court's authority but rather a rule of discretion. See R. STERN ET AL., *supra*, at 422. Beyond that, it is well settled that the Court "may consider additional questions" *not* presented in the petition "if necessary to *properly dispose* of the case." *Id.* at 416 (internal quotations omitted) (emphasis added); see, *e.g.*, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 n.12 (1981). Thus, the Court was perfectly free to decide that it should address the state-law extortion counts, even though they were outside the scope of the questions presented, because doing so would allow this Court properly to dispose of the RICO injunction issue by avoiding a decision on it. The Seventh Circuit should have conformed to what this Court *did*, not operated on presumptions about what this Court did *not* do.

II. The Court Should Decide Whether The Hobbs Act Punishes Acts Or Threats Of Violence To Property Or Persons, Unconnected To Either Extortion Or Robbery

In response to the rehearing petition, the panel has issued a published decision that strongly suggests, in direct conflict with decisions of the Sixth and Ninth Circuits, that the Hobbs Act makes it a felony punishable by up to 20 years in federal prison for any person to threaten (or commit) physical violence against any "property" (or "person") in a manner that "in any

way or degree * * * affects commerce" – even if such threats or acts of violence are wholly unconnected with robbery or extortion. Although the panel insisted that it was not actually resolving what it acknowledged is an "important question" of federal criminal law (App., *infra*, 6a), it proceeded to criticize virtually all the arguments advanced against this sweeping interpretation. The panel achieved the worst of all worlds by prejudging the outcome on remand yet prolonging already-protracted litigation by pretending to leave the district court with the first take on the issue.

Worse yet, the effect of the panel's analysis is to give credence to a far-reaching theory of liability broader in certain respects than even the expansive definition previously adopted by the same panel, which this Court rejected as "well beyond" the "outer boundaries" of Hobbs Act liability. *Scheidler II*, 537 U.S. at 402. The panel's decision creates conflicts with decisions of this Court and other courts of appeals, addresses an important and recurring issue, and is wrong.

A. *The Conflicts*. According to the panel, the circuits are in conflict over whether the Hobbs Act reaches freestanding acts or threats of violence against property or people, unconnected to either robbery or extortion. App., *infra*, 11a-12a. And it is true that both the Sixth and Ninth Circuit have rejected that interpretation as inconsistent with plain language of the Hobbs Act. See *id.* at 11a (citing *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975), and *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999)). On the other hand, the panel suggested that the Fourth Circuit reached the opposite result in *United States* v. *Milton*, 1998 WL 468812 (Aug. 4, 1998). App., *infra*, 12a; but see pages 24-25, *infra*. The panel expressed basic agreement with the supposed position of the Fourth Circuit, stating that the Sixth and Ninth Circuit approach "threatens to leave * * * an entire clause in the statute" with "no meaningful function to perform" (App., *infra*, 15a) and the Fourth Circuit's supposed reading takes the statutory text "at face value" and is "the result

one reaches looking at the statute as whole." *Id.* at 14a-15. Thus, the panel either created or exacerbated a circuit conflict.[7]

The panel's opinion is also at odds, in at least three respects, with this Court's decisions. *First*, it conflicts with *United States* v. *Enmons*, 410 U.S. 396 (1973), which reversed the Hobbs Act convictions of labor union officials and members who had engaged in acts of violence and destruction of property during a campaign to induce an employer to agree to a union contract. Although the defendants had fired high-power rifles at the employer's facility, and even blown up a company transformer, this Court ruled that they had *not* violated the Hobbs Act. The Court reasoned that there was no "obtaining of property of another" through "wrongful" means (18 U.S.C. § 1951(b)(2)) – part of the definition of "extortion" – because the defendants had acted to further "legitimate union objectives, such as higher wages in return for genuine services." 410 U.S. at 400.

If the Seventh Circuit is correct, however, then the conduct in *Enmons* violated the Hobbs Act after all. If the "physical violence" clause of the Hobbs Act is freestanding, and need not

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[7] The Hobbs Act question in this case also presents the Court with an opportunity to resolve other conflicts in the lower courts – specifically, conflicts over the meaning of "property" under the Hobbs Act. In *Scheidler II*, this Court, having concluded that there was no "obtaining" (or attempted obtaining), observed that there was no need to delineate precisely the "outer boundaries of extortion liability under the Hobbs Act." 537 U.S. at 402. In particular, the Court explained, it was unnecessary to address whether the term "property" in the Hobbs Act includes the three components mentioned in the jury instructions. See note 2, *supra*. But that avoided issue is clearly present in this case, and necessarily underlies any holding that freestanding acts or threats of violence to "property" are indeed covered. As we explained in our previous petition, the Seventh Circuit's definition of "property" for purposes of the Hobbs Act conflicts with the position taken by other circuits. See 01-1118 Pet. 17-20. Compare *Town of West Hartford* v. *Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990) and *Libertad* v. *Welch*, 53 F.3d 428, 436-37 (1st Cir. 1995) with App., *infra*, 59a (citing *United States* v. *Anderson*, 716 F.2d 446, 450 (7th Cir. 1983)).

have any connection to extortion or robbery, then it would not include "wrongful" "obtaining" as an element and the Hobbs Act would apply with full force to acts or threats of violence occurring during labor protests. Nor can there be any doubt that the acts of physical violence that were proven in *Enmons* "in any way or degree * * * affect[ed] commerce" (18 U.S.C. § 1951(a)). Thus, if the panel is correct, then the convictions in *Enmons* should have been sustained. Yet this Court, in *Enmons*, noted that in "nearly three decades that have passed since the enactment of the Hobbs Act, no reported case" had upheld the use of the Hobbs Act against violence occurring on the picket line – even though during this period "the Nation has witnessed countless economic strikes, often unfortunately punctuated by violence." 410 U.S. at 408-10. And this Court categorically rejected the government's "broad" reading of the Hobbs Act as punishing "[t]he worker who threw a punch on a picket line" by "20 years' imprisonment and a $10,000 fine" as contrary to the rule of lenity and "an unprecedented incursion into the criminal jurisdiction of the States." *Id.* at 410. So, too, here.

Second, the panel's decision is inconsistent with the logic of *Scheidler II*. As the panel acknowledged, the holding of *Scheidler II* rested on a determination that "Congress used the Penal Code of New York as a model for the [Hobbs] Act" and made a deliberate "decision to include extortion as a violation of the Hobbs Act *and omit coercion*." App., *infra*, 9a (emphasis added). See 537 U.S. at 403, 405-06; *id.* at 409 (distinction between coercion and extortion "controls these cases"). Moreover, as the panel also acknowledged (App., *infra*, 9a, 10a), the crime of coercion under New York law included acts or threats of "violence" against "other person[s]" or "property," unconnected to either extortion or robbery. See note 3, *supra*. It follows that freestanding acts or threats of violence – which constitute coercion under New York law – *cannot* be covered by the Hobbs Act without "eliminat[ing] the recognized distinction between extortion and the separate crime of coercion" and violating Congress's intent. 537 U.S. at 405-08. Thus, the panel was wrong to say that this Court's reasoning concerning

Congress's exclusion of coercion "offers at best a subtle indication, and at worst is not helpful at all." App., *infra*, 9a. In fact, *Scheidler II*'s reasoning is dispositive.

There are other inconsistencies with *Scheidler II* as well. The panel's statement that a single sentence in *Stirone* v. *United States*, 361 U.S. 212 (1960), which involved a prosecution for extortion, "suggests that the Court saw three distinct types of predicate acts in the statute" (App., *infra*, 9a) ignores this Court's clarification, in *Scheidler II*, that the sentence in question did *not* adopt a broad interpretation of the substantive provisions of the Hobbs Act but rather related only to the commerce clause element. See 537 U.S. at 408; but see *id.* at 417 (Stevens, J., dissenting). Even before *Scheidler II*, the Ninth Circuit had correctly rejected the panel's reading of this sentence in *Stirone*. *Yankowski*, 184 F.3d at 1074 ("The government's contention that this single statement * * *, taken out of context, should be used * * * to reject the clear and express provisions of the Hobbs Act is without merit.").

Inexplicably, the panel also ignored this Court's teaching, in *Scheidler II*, that the rule of lenity informs the interpretation of the substantive terms of the Hobbs Act. 537 U.S. at 408-09. The panel mistakenly suggested that the rule of lenity applies only if one of the two interpretations threatened to federalize traditional state crimes. App., *infra*, 12a (incorrectly stating that our "rule of lenity * * * argument is premised on the doomsday scenario they foresee if the Act is read to permit three independent predicate acts"). In fact, the rule of lenity requires courts to choose the narrower of two reasonable interpretations, even if neither reading threatens to federalize traditional state crimes. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 148-49 (1994).

As if that were not enough, the panel's decision is difficult to square with the reasons given by Justices Ginsburg and Breyer for concurring in *Scheidler II*. See 537 U.S. at 411-12 (concurring opinion). As Justice Ginsburg explained, the Court was "rightly reluctant" to "extend * * * further" the "domain" of RICO – a statute that "imposes severe criminal penalties and

hefty civil liability" and that "has already 'evolv[ed] into something quite different from the original conception of its enactors'" – "by endorsing the expansive definition of 'extortion' adopted by the Seventh Circuit." *Ibid.* (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 500 (1985)). Yet the panel's endorsement of the "freestanding" reading accomplishes the same undesirable expansion of RICO.

Third, the panel's treatment of "the 1948 revision and codification of Title 18 of the U.S. Code" – which adopted the current language of Section 1951 – is contrary to a long line of this Court's decisions. App., *infra*, 15a. According to the panel, although "these revisions were intended to be formal, stylistic changes," Congress "may have made certain substantive changes, either advertently *or inadvertently*." *Ibid.* (emphasis added). But this Court has long recognized the principle that it "will *not* be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention *be clearly expressed*." *United States* v. *Ryder*, 110 U.S. 729, 740 (1884) (emphasis added). And this Court has repeatedly applied that principle to the 1948 revisions themselves. See, *e.g.*, *Muniz* v. *Hoffman*, 422 U.S. 454, 468-70 (1975); *United States* v. *Cook*, 384 U.S. 257, 260 (1966). This Court's decisions thus establish that no substantive change in the law was brought about by the 1948 revisions – unless the detailed Reviser's Notes clearly indicate that "a substantive change in the law was contemplated." *Muniz*, 422 U.S. at 474. And, contrary to the panel's suggestion, this Court's cases do not allow any assumption that Congress made substantive changes "inadvertently." App., *infra*, 15a. Finally, the Reviser's Notes, which are reprinted in the U.S. Code Annotated, show that the changes to Section 1951 were not intended to be substantive at all. See 18 U.S.C. App. (Revisers' Notes), at 2591-92 (1948).[8]

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[8] The settled principles governing the construction of changes in language made by the 1948 revisions were clearly set forth in an article cited by the panel's own opinion (at App., *infra*, 15a). See Barron, *The Judicial Code: 1948 Revision*, 8 F.R.D. 439, 441 (1948-1949) ("There

B. *The Issue Is Important and Recurring*. "Over the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction * * *." *Evans* v. *United States*, 504 U.S. 255, 290 (1992) (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., dissenting). Although several federal statutes criminalize extortion, "[p]rosecutors prefer" the Hobbs Act because "it carries a twenty year maximum sentence." Lindgren, *The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815, 816 (1988). The Hobbs Act is also commonly invoked as a predicate act of racketeering in criminal prosecutions and private civil actions brought under RICO.

Because the Hobbs Act is so often used, an expansion of its scope has wide-ranging implications. In the past decade, RICO has repeatedly been used against abortion protesters, with mixed success. See, *e.g.*, *Palmetto State Med. Ctr., Inc.* v. *Operation Lifeline*, 117 F.3d 142 (4th Cir. 1997); *Feminist Women's Health Ctr.* v. *Codispoti*, 63 F.3d 863 (9th Cir. 1995); *Libertad* v. *Welch*, 53 F.3d 428 (1st Cir. 1995). There is no reason why, if the Seventh Circuit's latest interpretation of the Hobbs Act is correct, RICO actions based on predicate Hobbs Act offenses could not also be pursued against social protesters of all stripes, including those demonstrating for civil rights, environmental causes, or animal rights. It could also be applied to labor protests if acts or threats of violence (against persons *or* property) occur.[9]

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was no purpose on the part of the Revision staff to effect any change in existing law."); *id.* at 445-48 (discussing special rules governing judicial construction of 1948 Act).

[9] Contrary to the panel's suggestion, the practical impact of its far-reaching construction of the Hobbs Act is not mitigated because of Congress's inclusion of a jurisdictional element that "limits" the Hobbs Act's applicability to acts or threats of violence that "*in any way or degree* * * * affect[] commerce" (18 U.S.C. § 1951(a) (emphasis added)). App., *infra*, 12a (omitting italicized language). As explained above, a restrictive construction of the jurisdictional element of the Hobbs Act is inconsistent with this Court's teachings in both *Stirone* and *Scheidler II*.

C. *The Panel's Decision Is Wrong.* Any suggestion that the Hobbs Act punishes freestanding acts or threats of violence against property or persons is mistaken. By its plain terms, Section 1951 makes it a crime to "commit[] or threaten[] physical violence to any person or property" *only* if such acts or threats are committed "in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. § 1951(a). In other words, acts or threats of violence are proscribed by the Hobbs Act only if done in furtherance of a plan to commit (or attempt to commit) robbery or extortion.

Any doubt about the text's plain meaning is eliminated if one looks at the text of the Hobbs Act as enacted in 1946. See pages 9-10, *supra*. As even the panel was constrained to admit (App., *infra*, 15a), the text of the 1946 Act "explicitly" and unambiguously requires a connection between the forbidden acts or threats of violence and either robbery or extortion. As explained above, the panel was wrong to impute to the drafters of the 1948 revision an intent to make a substantive change.

The panel made other serious missteps on the merits. Contrary to the panel's suggestion (App., *infra*, 12a), the Fourth Circuit, in *United States* v. *Milton*, 1998 WL 468812 (Aug. 4, 1998), did *not* interpret the Hobbs Act as reaching freestanding acts or threats of violence. *Milton* involved a Hobbs Act conviction based on "a violent robbery." *Id.* at *1. Accordingly, the Fourth Circuit had no occasion to address the "freestanding" theory. Moreover, the only issue raised on appeal in *Milton* was whether the government had presented sufficient evidence that the defendant's robbery affected interstate commerce.[10]

See also 18 U.S.C. § 1951(b)(3) (defining "commerce" broadly).

[10] Contrary to the panel's suggestion (App., *infra*, 12a), it is not possible fairly to interpret as an endorsement of the "freestanding" theory the *Milton* court's passing statement (in dictum) that "[t]here are two essential elements" of a Hobbs Act conviction: interference with interstate commerce, and a crime of robbery, extortion or violence. See *United States* v. *Bailey*, 990 F.2d 119, 125 (4th Cir.1993) (quoting *Stirone* v. *United States*, 361 U.S. 212, 218, 80 S. Ct. 270, 4 L. Ed.2d 252

Equally flawed was the panel's speculation that the snippet of language torn from *Milton* "likely * * * was expressing agreement with the position of the government, though * * * it is impossible to know." App., *infra*, 12a. In fact, the United States' brief in *Milton* in no way mentioned or endorsed the "freestanding" theory. See Br. of Appellee, *United States* v. *Milton*, No. 96-4851 (4th Cir. filed Aug. 19, 1992) (addressing issues of robbery's jurisdictional nexus to interstate commerce and sentencing disparity). That should come as no surprise, because the Hobbs Act conviction in that case involved a robbery.

Nor was the panel correct in stating that "[i]t appears to us that the United States may still be taking that position with respect to the scope of the Hobbs Act for purposes of criminal prosecutions, though we cannot be sure without requesting the views of the Solicitor General." App., *infra*, 12a. The Justice Department has *rejected* the "freestanding" reading:

> The statutory prohibition of "physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section" *is confined to violence for the purpose of committing robbery or extortion.*

U.S. DEPT. OF JUSTICE, CRIMINAL RESOURCE MANUAL § 2402 (1997) (emphasis added) (citing *United States* v. *Franks*, 511 F.2d 25, 31 (6th Cir. 1975)) <http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm02402.htm>.

The panel was also wrong to suggest that limiting criminal liability under the Hobbs Act to acts or threats of physical violence "in furtherance of a plan or purpose to do anything in violation of" Section 1951 (18 U.S.C. § 1951(a)) would violate the "well-worn canon of statutory interpretation under which a

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(1960))." *Milton*, 1998 WL 468812, at *1. What *Bailey* actually says is that the "two essential elements of the Hobbs Act crime" that were identified in *Stirone* were "interference with commerce, *and extortion*." *Bailey*, 990 F.2d at 125 (emphasis added) (quoting *Stirone*, 361 U.S. at 218). The *Milton* panel's inaccurate paraphrase in an unpublished opinion hardly counts as endorsement of the "freestanding" theory.

court should avoid making one part of statute meaningless." App., *infra*,14a. That analysis is soundly refuted by the language of the 1946 Act, which (as even the panel conceded) required that acts or threats of violence be connected to either robbery or extortion. See pages 9-10, *supra*.

For all of these reasons (and still others more suitable for a merits brief than a petition), and because of its inconsistency with *Scheidler II*, *Enmons*, and this Court's cases interpreting the 1948 revisions to Title 18, the panel's decision is wrong.[11]

III. This Court Should Grant Review Again To Resolve The Circuit Split Over Whether Injunctive Relief Is Available In A Private RICO Action

Almost three years ago, this Court in *Scheidler II* granted certiorari to decide the following question: "Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO], 18 U.S.C. § 1964(c)." 01-1118 Pet. i. In reversing on the merits, this Court concluded that it "need not address" this question "[b]ecause all of the predicate acts supporting the jury's finding of a RICO violation" and the liability judgment itself "must be reversed" and the injunction "vacated." 537 U.S. at 411.

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[11] The panel's heavy reliance (App., *infra*, 8a, 13a) on Bradley, *NOW v. Scheidler: RICO Meets The First Amendment*, 1994 SUP. CT. REV. 129 (1994), was misplaced. That article antedates this Court's decision in *Scheidler II*, which establishes that Congress did not intend to punish conduct that would qualify as coercion under New York law. It also suffers from multiple flaws, including: (1) its failure to analyze the language of the Hobbs Act as enacted, which refutes the "freestanding" reading and disproves the article's argument about Congress's intent; (2) its failure to address (much less explain) how the "freestanding" reading can be reconciled with *Enmons*; and (3) its reliance on a passage from a 1945 House Report that referred to a *different* title from what would become the Hobbs Act in a larger, omnibus bill – a title that was never enacted. See Bradley, 1994 SUP. CT. REV. at 143 n.78.

Under the opinion on remand, the issue remains alive after all. And the conflict in the circuits has persisted and spawned additional confusion in the lower courts. See, *e.g.*, *In re Managed Care Litigation*, 298 F. Supp. 2d 1259, 1282-83 (S.D. Fla. 2003); *Motorola Credit Corp.* v. *Uzan*, 202 F. Supp. 2d 239, 243-44 (S.D.N.Y. 2002), remanded, 322 F.3d 130 (2d Cir. 2003). As we explained in our prior petition for a writ of certiorari, the issue is both important and recurring. Moreover, the Seventh Circuit's decision is manifestly incorrect (a conclusion endorsed by the Solicitor General's merits brief in *Scheidler II*).

A. As we demonstrated in our previous petition for a writ of certiorari (01-1118 Pet. 6-10), the Seventh Circuit's earlier opinion squarely conflicts with the Ninth Circuit's decision in *Religious Technology Ctr.* v. *Wollersheim*, 796 F.2d 1076 (1986), cert. denied, 479 U.S. 1103 (1987). Although respondents, in unsuccessfully opposing certiorari, argued that there was no circuit split because *Wollersheim* involved a preliminary injunction (Opp. 7), we explained that this argument was wrong, refuted by the Ninth Circuit's analysis and by subsequent Ninth Circuit cases, inconsistent with the Seventh Circuit's own analysis, and contrary to representations made by respondents' counsel during oral argument in the Seventh Circuit. See 01-1118 Pet. 6-10; 01-1118 Pet. Reply Br. 2-3 & n.5.

B. In becoming the first federal appellate court to uphold the availability of injunctive relief in this setting, the Seventh Circuit in 2001 suggested in multiple ways that the intercircuit conflict it was creating should not raise concerns because judicial opinion about the availability of injunctive relief was divided, and because *Wollersheim* reflected an outmoded method of statutory interpretation, rested on errors, or had been superseded by later decisions of this Court. These efforts to mask the extent of the panel's radical departure from settled law are worth highlighting because of their striking similarity to the panel's most recent decision. In both instances, the panel went to great lengths to reach a particular outcome and characterize it as

supported by the decisions of other circuits and of this Court when in fact exactly the opposite was true.

First, the panel's prior opinion sought to disguise the extent of its departure from settled law by suggesting that "other courts of appeals * * * have addressed the point in *dicta* [and] are split." App., *infra*, 35a. In fact, every other circuit that had discussed the issue of injunctive relief for private parties had agreed with the Ninth Circuit. Contrary to the panel's suggestion (*ibid.*), the Eighth Circuit in *Bennett* v. *Berg*, 710 F.2d 1361, 1364 n.5 (en banc), cert. denied, 464 U.S. 1008 (1983), did not endorse the availability of private injunctions but rather expressly reserved the issue. Neither did the First Circuit reach the issue in *Lincoln House, Inc.* v. *Dupre*, 903 F.2d 845, 848 (1990). In similar fashion, as explained above, the panel's most recent opinion incorrectly suggests that (1) the Fourth Circuit has interpreted the Hobbs Act as punishing freestanding acts or threats of violence, and (2) the United States government may still be pressing that interpretation today. The panel's previous holding concerning the availability of injunctive relief in private RICO actions – like the reading of the Hobbs Act it now suggests is the most plausible – is, in fact, wholly unprecedented in the appellate courts.

Second, the panel was wrong in 2001 to suggest that *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83 (1998), undermines "any rationale * * * that the courts of appeals may have followed in earlier years." App., *infra*, 38a. That case has no relevance to *Wollersheim* – which may explain why respondents never cited *Steel Co.* in their briefs in the court of appeals or in this Court (and made no effort to defend the panel's reliance on it at either the petition or merits stages).[12]

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[12] *Steel Co.* involved the citizen-suit provision of the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11046(a)(1), which authorizes civil penalties and injunctive relief. The statute also contains a provision stating that district courts "shall have jurisdiction in actions brought under subsection [11046(a)]." 42 U.S.C. § 11046(c). In *Steel Co.*, this Court rejected the argument that, because Section

Third, the panel wrongly suggested that "Supreme Court decisions since the 1986 *Wollersheim* opinion" demonstrate that "the approach of the Ninth Circuit" – and in particular its reliance on legislative history – "no longer conforms to the Court's present jurisprudence." App., *infra*, 35a. In fact, the Ninth Circuit's decision rested principally on the *text and structure* of RICO – as well as on the crucial fact, brushed aside by the panel (*id.* at 42a), that Congress modeled Section 1964(c) on virtually identical provisions in the Sherman and Clayton Acts (provisions that, at the time RICO was enacted, had been authoritatively interpreted by this Court as *not* authorizing injunctive relief). See 796 F.2d at 1081-84, 1087. Moreover, the predecessor provision in the Clayton Act coexists with a separate provision in that statute that expressly authorizes private injunctive relief (a provision that has no equivalent in RICO and that was proposed, but rejected, as a RICO amendment).[13]

Just as the panel's earlier opinion seeks to brush aside this powerful evidence of RICO's meaning by labeling it "legislative history," the panel's most recent opinion refers to the *language of the Hobbs Act as enacted* as "legislative history" evidence. App., *infra*, 15a. It does so by treating the 1948 recodification of the whole of Title 18 as the crucial statute, even while acknowledging that the 1948 "revisions were intended to be formal, stylistic changes." App., *infra*, 15a. The panel then speculated that "it is not beyond the realm of possibility that the revisers

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11046(c) refers to "jurisdiction," it follows that "all of the elements of a cause of action under" Section 11046(a)(1) implicate the court's subject-matter jurisdiction. 523 U.S. at 90.

[13] Contrary to the panel's suggestion, this Court often has looked to legislative history for guidance in interpreting RICO. See, *e.g.*, *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 164 (2001); *Rotella* v. *Wood*, 528 U.S. 549, 557 (2000); *Holmes* v. *SIPC*, 503 U.S. 258, 267 (1992). Indeed, the Court has "repeatedly" relied on the fact that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act." *Holmes*, 503 U.S. at 267 (case citations omitted); *Agency Holding Corp.* v. *Malley-Duff & Assocs.*, 483 U.S. 143, 150-51 (1987).

may have made certain substantive changes, either advertently or inadvertently." *Ibid.* As explained above, that analysis is contrary to a long line of this Court's decisions and it ignores Congress's clear intent that the 1948 recodification *not* result in any substantive changes unless the Revisers' Notes say so specifically (which they not do for the Hobbs Act). And nothing in this Court's decision in *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 125 S. Ct. 460 (2004) (see App., *infra*, 8a-9a, 14a-15a), remotely supports such an approach to statutory interpretation.

C. The possibility that the district court, on remand, will elect not to uphold the injunction (in the original or modified form) is not a good reason to deny review of this issue. In light of this Court's decision in *Scheidler II*, petitioners should not be required to litigate that issue (in the district court and perhaps in yet another appeal to the Seventh Circuit) in this 19-year-old litigation. Moreover, the issue has already been fully briefed and argued in this Court, and the Court presumably would not have avoided its resolution if it had thought there was a possibility that an injunction could remain intact on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS BREJCHA
DEBORAH FISCHER
Thomas More Society
29 South LaSalle Street
Suite 440
Chicago, IL 60603
(312) 782-1680

D. COLETTE WILSON
1880 S. Redwood Street
Escondido, CA 92025
(760) 737-7181

ALAN UNTEREINER*
ROY T. ENGLERT, JR.
KATHRYN S. ZECCA
BRIAN WILLEN
Robbins, Russell, Englert,
Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

* *Counsel of Record*

MARCH 2005

APPENDICES

APPENDIX A

United States Court of Appeals,
Seventh Circuit.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Plaintiffs-Appellees,
v.
Joseph M. SCHEIDLER, et al., Defendants-Appellants.

No. 99-3076, 99-3336, 99-3891, 99-3892, 01-2050.

Jan. 28, 2005.

Appeals from the United States District Court
for the Northern District of Illinois,
Eastern Division. No. 86 C 7888 – David H. Coar, Judge.

On Petitions for Rehearing and Rehearing En Banc.*

Before ROVNER, WOOD and EVANS, *Circuit Judges*.

WOOD, *Circuit Judge*. On February 26, 2004, this court issued an order responding to the remand of this case from the Supreme Court of the United States. See *Nat'l Org. for Women, Inc.* v. *Scheidler*, 2004 WL 375995 (7th Cir. Feb. 26, 2004), on remand from *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 397 (2003) (*NOW II*). In that order, we acknowledged the issues that were resolved by the Supreme Court, and we identified one question that remains in the case. The defendants

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* After a vote, a majority of the judges in regular active service did not wish to hear this case *en banc*. Chief Judge Flaum, Judge Manion and Judge Kanne voted to grant rehearing *en banc*. Judge Ripple took no part in consideration or decision of this case.

then filed petitions for rehearing and rehearing *en banc* from that order. This opinion responds to those petitions.

I

For the convenience of all, we begin by reproducing the relevant text of the unpublished order that we issued on that date:

> In 1986, the National Organization for Women (NOW) and two health clinics that perform abortions ("plaintiffs") filed this class action alleging that defendants, a coalition of antiabortion groups called the Pro-Life Action Network (PLAN), Joseph Scheidler, and other individuals and organizations that oppose abortion, engaged in conduct amounting to a pattern of extortion in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). A more detailed account of the facts and the lengthy procedural history of this litigation is provided in the Supreme Court's first opinion in this case, *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*NOW I*), and in our prior decisions, *National Organization for Women, Inc.* v. *Scheidler*, 267 F.3d 687 (7th Cir. 2001), and *National Organization for Women, Inc.* v. *Scheidler*, 986 F.2d 612 (7th Cir. 1992).
>
> After the Supreme Court in *NOW I* remanded the case, the district court conducted a seven-week trial, at which the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. In response to special interrogatories, the jury found that the defendants or others associated with PLAN committed 21 violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 18 U.S.C. § 1952, 23 instances of attempting to violate the Travel Act, and four "acts or

threats of physical violence to any person or property." On this basis, the jury awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants appealed a number of issues relating to the conduct of the trial and the issuance of the injunction. We affirmed the district court's judgment in all respects. *Scheidler*, 267 F.3d at 693.

The defendants then filed a petition for a writ of certiorari with the United States Supreme Court, which the Court granted with respect to two of the three questions presented by the petition. *Scheidler* v. *Nat'l Org. for Women, Inc.*, 535 U.S. 1016 (2002). The Court limited its grant of certiorari to the following questions:

> 1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO].
>
> 2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery or extortion" [–] and which defines "extortion" as "the obtaining of property from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear" – criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

Pet. for Writ of Cert., 2002 WL 32134867 (U.S. Jan. 28, 2002) (No. 01-1118) (internal citation omitted). In its opinion, the Court explained that it granted certiorari to

determine "whether petitioners committed extortion within the meaning of the Hobbs Act" and "whether respondents, as private litigants, may obtain injunctive relief in a civil action" under RICO. *NOW II*, 537 U.S. at 397. The Court held that "petitioners did not commit extortion because they did not 'obtain' property from respondents as required by the Hobbs Act," and this determination "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Id.* It therefore "reverse[d] without reaching the question of the availability of private injunctive relief under § 1964(c) of RICO," *id.*, and held that "[w]ithout an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated," *id.* at 411.

On remand to this court, the parties submitted Statements of Position pursuant to Circuit Rule 54. Plaintiffs argue that, although the Court in *NOW II* disposed of the 117 extortion-based predicate acts under RICO, the defendants did not petition for a writ of certiorari on the four predicate acts involving "acts or threats of physical violence to any person or "property" and, accordingly, the Court did not decide whether these acts alone could support the district court's injunction. In response, defendants contend that the Hobbs Act does not outlaw "physical violence" apart from extortion and robbery, and therefore the Supreme Court's holding that the defendants did not commit extortion precludes a finding that the four acts or threats of violence might independently support the injunction. We remand to the district court to address this issue – which never before in this litigation has been the subject of full briefing or judicial consideration – in the first instance.

Although "[a]n order limiting the grant of certiorari does not operate as a jurisdictional bar," *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 (1981), the Supreme Court has consistently adhered to its Rule 14.1(a), which provides that "[o]nly the questions set out in the petition, or fairly

included therein, will be considered by the Court." See *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184 (2002); *Glover* v. *U.S.*, 531 U.S. 198, 205 (2001). Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari, see, *e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 244 n. 6 (2001); *West* v. *Gibson*, 527 U.S. 212, 233 (1999); *Nynex Corp.* v. *Discon, Inc.*, 525 U.S. 128, 140 (1998), we will not presume that in this case it went beyond the scope of its grant of certiorari, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction. We note that the Courts' opinion in *NOW II* makes no mention of these four predicate acts, and the parties' briefs before the Court reference these acts only in passing in footnotes. To conclude that the Court found these four predicate acts insufficient to support the district court's injunction would therefore require that we find both that the Court went beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion. We decline to draw such a conclusion.

Instead, we remand to the district court to determine whether the four predicate acts involving "acts or threats of physical violence to any person or property" are sufficient to support the nationwide injunction that it imposed. See *Glover*, 531 U.S. at 205 ("As a general rule . . . we do not decide issues outside the questions presented by the petition for certiorari. Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance." (citing Sup.Ct.R. 14.1(a))). As part of this inquiry, the court may find it necessary to interpret the language of the Hobbs Act, which provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce,

by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). Specifically, the court may need to determine whether the phrase "commits or threatens physical violence to any person or property" constitutes an independent ground for violating the Hobbs Act or, rather relates back to the grounds of robbery or extortion. In the alternative, the court may conclude that the proper interpretation of § 1951(a) is immaterial, if it decides that the four acts or threats of physical violence found by the jury are not sufficient standing alone to support the nationwide injunction. As the parties' Circuit Rule 54 submissions offer only a preliminary discussion of these issues, and neither this court nor the district court has addressed them previously, we consider it best to remand the case to the district court.

The February 26 order, in summary, thus concludes that one narrow question has yet to be resolved in the case. The Court did not have before it, and thus made no ruling on, the question whether four more predicate acts involving "acts or threats of physical violence to any person or property" could support a more narrow injunction. We concluded that the better part of wisdom was to remand that limited question to the district court.

II

The petitions for rehearing take issue with two aspects of our decision on remand: first, our finding that one issue remains in the case that needs to be tied up, and second, what the defendants believe is our implicit resolution of an important question of statutory interpretation regarding the scope of the Hobbs Act. Despite the arguments the dissenting judges have presented, we continue to believe that the Court's opinion left open the issue we identified. We take this opportunity to underscore the fact that we have not, at this point, ruled either

implicitly or explicitly on the Hobbs Act issue, for reasons of judicial economy and restraint. As we explain below, there is no need for this court to decide a question that may not even be pertinent to the case once the district court has looked at the points that remain on remand.

As we noted in the order reproduced above, the Supreme Court's opinion did not address the legal implications of the remaining four acts of physical violence. Indeed, any reader will see that the Court had nothing at all to say about them, for the understandable reason that they were not included in the petitions for *certiorari*. We have nothing to add on that point to what we have already written. With respect to the Hobbs Act dispute, which we describe in a moment, it seemed possible (perhaps even likely) that the district court might come to the conclusion that the four acts of physical violence are not sufficient standing alone to justify any injunction at all. It is not even clear whether the acts of violence were sufficiently well defined to justify any injunctive relief. Moreover, it is too late in the day for the plaintiffs to try to prove an entitlement to damages associated with those violations. They had their chance to do so when the case was tried in the district court, and there is nothing in the Supreme Court's opinion that would justify re-opening the original judgment on this point. The only remaining question, to repeat, is whether a different injunction, tailored to the violations found, would be appropriate. See, *e.g.*, *Missouri* v. *Jenkins*, 515 U.S. 70, 89 (1995). The district court is in the best position to decide what to do in these circumstances, given its extensive familiarity with the voluminous record in this case. This is not, however, an invitation either to the court or to the parties to re-open that record. If there is anything at all that is to be done, it must be based on the record that has already been built.

If and only if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury, that court will have to confront a more complex legal issue, namely, whether the acts or threats

of violence language in the Hobbs Act may serve as an independent predicate act under RICO. The relevant part of the Hobbs Act reads as follows:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, *or commits or threatens physical violence* to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a) (emphasis added). As the defendants' petitions for rehearing and plaintiffs' answer demonstrate, there are two possible interpretations of this language. "First it may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion." Craig M. Bradley, *NOW* v. *Scheidler: RICO Meets the First Amendment*, 1994 SUP. CT. REV. 129, 142-43 (1994). We will refer to this as the "two-way" interpretation, where the two acts are robbery and extortion. "The other possible reading . . . forbids threatening or committing physical violence in furtherance of a plan to 'obstruct, delay, or affect commerce' (other than through robbery or extortion)." *Id.* at 143. Under the latter reading, the Hobbs Act identifies three different ways in which illegal interference with interstate commerce may occur: (1) by robbery, (2) by extortion, or (3) by physical violence. We will refer to this as the "three-way" interpretation.

The choice between these two competing interpretations is not obvious. Grammatically, the text can be read either way without undue strain. Moreover, there is no decisional law that throws light on which of the two readings is to be preferred. The Supreme Court has had no occasion to address the question. The Court has, however, had pertinent things to say about the scope of the Hobbs Act, and it has recently reaffirmed the utility of taking a "holistic" approach to questions of statutory interpretation, see *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 125

S. Ct. 460, 466-67 (2004). With that in mind, we take a closer look at this issue.

In *Stirone* v. *United States*, 361 U.S. 212 (1960), the Supreme Court described the Hobbs Act as follows: the "Act speaks in broad language, manifesting a purpose to use all the constitutional power Congress had to punish interference with interstate commerce by extortion, robbery or physical violence." *Id.* at 215. This phraseology suggests that the Court saw three distinct types of predicate acts in the statute. See also *United States* v. *Peterson*, 236 F.3d 848, 851 (7th Cir. 2001); *United States* v. *Carmichael*, 232 F.3d 510, 516 (6th Cir. 2000); *United States* v. *Rodriguez*, 218 F.3d 1243, 1244 (11th Cir. 2000). None of these cases, however, squarely confronted the question whether an act of physical violence constitutes a distinct kind of predicate act – a point that the Ninth Circuit underscored in *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999), which held that *Stirone* did not resolve the issue and went on to adopt the two-way reading of the statute.

In their petition for rehearing, the defendants identify language in the Supreme Court's opinion in *NOW II* that, they argue, indicates that the Court itself has now opted for the two-way interpretation. But the passage to which they point offers at best a subtle indication, and at worst it is not helpful at all. In the course of discussing the legislative history of the Hobbs Act, the Court noted that Congress used the Penal Code of New York as a model for the Act. *NOW II* at 403. It emphasized that the New York Penal Code distinguished "between extortion and the separate crime of coercion," which "involved the use of force or threat of force to restrict another's freedom of action." *Id.* at 405. "With this distinction between extortion and coercion clearly drawn in New York law prior to 1946," the Court explained, "Congress's decision to include extortion as a violation of the Hobbs Act and omit coercion is significant assistance to our interpretation of the breadth of the extortion provision." *Id.* at 406. The Court acknowledged that "coercion and extortion certainly overlap to the extent that extortion

necessarily involves the use of coercive conduct to obtain property," but nonetheless it stressed that "there has been and continues to be a recognized difference between the two crimes, and we find it evident that this distinction was not lost on Congress." *Id.* at 407-08 (internal citations omitted). In drawing this conclusion and in declining to subsume the crime of coercion into the Hobbs Act's reference to "extortion," the Court quoted *McNally* v. *United States*, 483 U.S. 350 (1987), for the proposition that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *NOW II*, 537 U.S. at 409 (quoting *McNally*, 483 U.S. at 359-60); see also *Leocal* v. *Ashcroft*, 125 S. Ct. 377, 384 n. 8 (2004). It thus concluded that "[i]f the distinction between extortion and coercion, which we find controls these cases, is to be abandoned, such a significant expansion of the law's coverage must come from Congress, and not from the courts." 537 U.S. at 409.

This discussion, however, addressed the question whether the definition of extortion was elastic enough to encompass the acts of coercion whereby the defendants and their allies were attempting to block women from clinics where abortions were performed. The focus was on the deprivation of the women's right to obtain the services they desired and whether that amounted to "extortion." It is true that the New York Penal Code defined coercion to include certain acts or threats of violence against persons or property, see *NOW II*, 537 U.S. at 406 n. 10 (quoting from New York Penal Code § 530 (1909)). It is also true that the Court concluded that Congress affirmatively chose not to list "coercion" as a separate ground for Hobbs Act liability. Nonetheless, the Court was not addressing the analytically distinct question whether the conduct at issue could be considered as acts of violence that obstructed, delayed, or affected interstate commerce, or that obstructed, delayed, or affected the movement of articles or commodities in commerce. Had it done so, one might have expected some discussion of cases like *United States* v. *Morrison*, 529 U.S. 598

(2000) (holding in part that the Violence Against Women Act could not be sustained as a regulation of activity affecting interstate commerce) and *Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (upholding in part an injunction protecting access to abortion clinics entered pursuant to state law); see also 18 U.S.C. § 248 (freedom of access to clinics), upheld in *United States* v. *Wilson*, 154 F.3d 658 (7th Cir. 1998). No such discussion appears, for the simple reason that the issue was not before the Court.

The Sixth and Ninth Circuits have both had occasion to address the question how the Hobbs Act should be interpreted. See *United States* v. *Yankowski, supra*, 184 F.3d 1071; *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975). They both have concluded that the Act establishes just two RICO predicate acts – robbery and extortion – and that the phrase "or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section" simply modified the words "robbery" and "extortion." In *Yankowski*, the Ninth Circuit considered the question whether an anti-abortion protester who set fire to a clinic roof could be convicted under the Hobbs Act. See 184 F.3d at 1072. The court rejected the three-part reading of the Act, explaining that "the statutory language clearly requires that the violent act pertain to a violation of *this section*, not merely to a violation of 'the law' generally." *Id.* at 1073. On that basis, it concluded that "[a] person may violate the Hobbs Act by committing or threatening a violent act against person or property, but only if it is in furtherance of a plan to interfere with commerce *by extortion or robbery*." *Id.* In support of that interpretation, the court relied on the language of the predecessor to the Hobbs Act, the Anti-Racketeering Act of 1934, which it described as providing that "[a]ny person who, in connection with or in any degree affecting trade or commerce (a) commits or attempts extortion of money, or (b) obtains property through extortion, or (c) 'commits or threatens to commit an act of physical violence or physical injury to a person or property in furtherance of a plan or purpose to violate

sections (a) or (b),' or (d) conspires with respect to (a), (b), or (c)... shall be imprisoned or fined." *Id.* at 1073 n. 5. The Sixth Circuit came to essentially the same result in *Franks, supra*.

Notably, in both *Yankowski* and *Franks* the government had argued unsuccessfully that the statute described three independent predicate acts. It appears to us that the United States may still be taking that position with respect to the scope of the Hobbs Act for purposes of criminal prosecutions, though we cannot be sure without requesting the views of the Solicitor General. We note, however, that in an unpublished opinion, the Fourth Circuit stated that "[t]here are two essential elements of a Hobbs Act conviction: interference with interstate commerce, and a crime of robbery, extortion or violence." *United States* v. *Milton*, 153 F.3d 724, 1998 WL 468812, at *1 (4th Cir. Aug. 4, 1998). It seems likely that this court was expressing agreement with the position of the government, though once again, it is impossible to know.

The defendants also invoke the rule of lenity mentioned by the Supreme Court in *NOW II* and *Leocal* in support of the two-way interpretation. But this argument is premised on the doomsday scenario they foresee if the Act is read to permit three independent predicate acts. They predict that under the three-way interpretation, "the traditional state-law offenses of malicious destruction of property, reckless endangerment, and even assault would be Hobbs Act violation punishable by 20 years in federal prison." Operation Rescue adds that this would make the Hobbs Act a "breath-takingly broad general federal anti-violence statute" and it would raise "obvious constitutional problems" under the Supreme Court's Commerce Clause jurisprudence. In our view, these predictions greatly overstate the case. The Hobbs Act itself contains a jurisdictional element that limits its application to anyone who "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a); see also *Jones* v. *United States*, 529 U.S. 848 (2000) (adopting a narrow interpretation of the federal arson statute, 18 U.S.C. § 844(i), to avoid

constitutional problems). We are satisfied that we have a normal question of statutory interpretation before us and that the sky is not likely to fall whichever way it is resolved.

The plaintiffs argue that the "plain" text of § 1951 favors their position. They adopt the reasoning offered by Professor Bradley:

> [The Hobbs Act] may simply forbid committing or threatening violence in furtherance of a plan to obstruct commerce by robbery or extortion. But this interpretation makes no sense! Robbery and extortion frequently involve the commission (robbery) or threat (extortion) of violence, though "extortion" covers other threats as well. Moreover, the "robbery and extortion" clauses also forbid "attempts" and conspiracies. Thus, under this reading, the "physical violence" clause would be less inclusive, and hence would add nothing, to the preceding "robbery" and "extortion" clauses. One who commits violence in furtherance of a plan to commit robbery or extortion has either committed, attempted, or conspired to commit robbery or extortion and thus has violated the first clause, rendering the third clause nugatory.

Bradley, *supra*, at 142-43. At a minimum, it is hard to argue with the proposition that any reading of the Hobbs Act ought to take into account the statute as a whole. That means that the language of § 1951(a) should be understood in light of the definitions provided by § 1951(b). In the latter subsection, the Act defines "robbery" and "extortion" so that they already cover all acts of physical violence that are undertaken in furtherance of the respective offense. "Robbery" is defined in part as "the unlawful taking or obtaining of personal property from the person . . . against his will, by means of *actual or threatened force, or violence, or fear of injury*, immediate or future, to his person or property." 18 U.S.C. § 1951(b)(1) (emphasis added). Likewise, "extortion" is defined as "the obtaining of property from another, with his consent, induced by wrongful use of

actual or threatened force, violence, or fear, or under color of official right." *Id.* at § 1951(b)(2) (emphasis added).

Recognizing the well-worn canon of statutory interpretation under which a court should avoid making one part of a statute meaningless, the defendants have tried to think of cases in which the "physical violence" clause would cover individuals who were acting in furtherance of a plan to commit robbery or extortion, but whose acts do not already fall within the definitions of robbery, extortion, or attempts or conspiracies to rob or extort. Their efforts reveal the difficulty they face in this connection. Anyone who commits physical violence to a person or property in furtherance of a plan of robbery or extortion would almost certainly be found to have attempted one of those crimes, or, if others are involved, to have conspired to commit one or the other. Operation Rescue, for instance, offers the example of the "subordinate 'enforcer' who, while not himself extorting or robbing anything, harms people or property when the extortionist or robber does not obtain the desired payment from the victim." But such a subordinate "enforcer" would fall squarely within the Act's conspiracy language. Another example the defendants offer is the case of one who threatens violence in furtherance of a "personal" plan to rob a bank or to commit extortion, without either conspiring with anyone else or taking enough steps to amount to an attempted crime. It is hard to see how such a remote threat could be in furtherance either of extortion or robbery (defendants' view) or in furtherance of a plan to "obstruct, delay" or otherwise hamper the movement of goods in commerce (plaintiffs' view). It seems unlikely that Congress included the "violence" language to capture such a tiny set of academic hypotheticals.

Even if one were to conclude that the plain language approach favors the interpretation urged by the plaintiffs, there is still legislative history to consider. The defendants argue that the legislative history of the Hobbs Act should be allowed to trump the result one reaches looking at the statute as a whole. Many judges believe that legislative history should be used, if

at all, only to disambiguate language that does not yield to any other mechanism. The Supreme Court's *Koons Buick* decision indicates that legislative history is also appropriate if the plain language leads one to an absurd result. But we see nothing absurd in the three-way interpretation the plaintiffs have urged. To the contrary, it is the approach favored by the defendants that threatens to leave one with an entire clause in the statute that has no meaningful function to perform.

Having said that, we acknowledge that the legislative history indicates that Congress was principally concerned with the effects of robbery and extortion on interstate commerce (though it never affirmatively negated the three-way interpretation, either at the time of the 1948 revision of the Criminal Code or thereafter). See generally *Callanan* v. *United States*, 364 U.S. 587, 591 & n. 5 (1961). Until the 1948 revision and codification of Title 18 of the U.S. Code, the statute explicitly linked the "acts of physical violence" clause to the prohibition on robbery and extortion. See Pub. L. No. 486, 60 Stat. 420 (1946). In 1948, however, the Act assumed its present form. See Pub. L. No. 772, 62 Stat. 793-94 (1948). While these revisions were intended to be formal, stylistic changes, it is not beyond the realm of possibility that the revisers may have made certain substantive changes, either advertently or inadvertently. Compare, for example, the similar fate of the Judicial Code, which was recodified at the same time as the Criminal Code, and which changed in a number of substantive respects as a result. See generally William W. Barron, The Judicial Code, 8 F.R.D. 439 (1948-49). Moreover, the present form of the Act has been in effect for more than 55 years, and the safest approach may be to take it at face value.

III

We continue to believe, as we did when the February 26 order was issued, that it would be imprudent to resolve this problem of statutory interpretation at this stage of the litigation of this particular case. Most importantly, as we indicated at the outset of this opinion, it may be unnecessary to the resolution of

this case. Second, the brief discussion we have included in this opinion demonstrates that the issue is a complex one that deserves not only full briefing and participation by all parties, but also input from the United States, given the effect of any ruling on the scope of the Hobbs Act with or without RICO in the picture. Rather than launch such an ambitious project at the tail end of litigation that has been running for almost twenty years, we prefer a wait-and-see approach.

In closing, we wish to re-emphasize that this remand is not a "green light" to start this old litigation anew. The plaintiffs have lost their bid to have a nationwide injunction based on the 117 acts that the Supreme Court has now decreed do not qualify as "extortion" for purposes of the Hobbs Act and RICO. From what we can tell of the record, it appears that it would be an abuse of discretion for the district court to re-enter any nationwide injunction based only on the four remaining acts of violence found by the jury. Such an injunction would violate the rule requiring courts to tailor injunctive relief to the scope of the violation found. We note as well that the Freedom of Access to Clinic Entrances Act, 18 U.S. § 248, has now been in effect for five more years since the district court first considered the necessity of a nationwide injunction, and experience may require a reassessment of the Act's impact. Finally, it is too late in the day for the plaintiffs to try to seek additional damages relief for acts that they could have addressed at the original trial. The only remaining question is therefore whether any injunction is appropriate to redress the four acts of physical violence that the jury found had taken place and that were not encompassed within the Supreme Court's ruling. This does not open Pandora's Box. It merely resolves the final loose ends in this long-running litigation in a manner that is fair to both sides and that acknowledges the need to resolve all properly presented issues.

The case is REMANDED to the district court for further proceedings consistent with this opinion.

MANION, *Circuit Judge*, joined by KANNE, *Circuit Judge*, dissenting from the denial of petition to rehear en banc. Following more than eighteen years of litigation, a seven-week jury trial, and two trips to the United States Supreme Court, the Supreme Court held in *Scheidler* v. *National Organization for Women, Inc.*, 537 U.S. 393 (2003), that "*all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," and that "*[w]ithout an underlying RICO violation*, the injunction issued by the District Court must necessarily be vacated." *Id.* at 410 (emphasis added). Nonetheless, on remand, a panel of this court concluded that not "*all* of the predicate acts" were reversed, but that the jury's finding of four predicate acts or threats of violence remained viable. *National Org. for Women, Inc.* v. *Scheidler*, 2004 WL 375995, at *3 (7th Cir. Feb. 26, 2004). Today on rehearing, the panel reaffirms that remand order, while unnecessarily debating, but not deciding, the scope of the Hobbs Act. Because I believe that the Supreme Court meant what it said, and because, in any event, the underlying four predicate acts of violence cannot, as a matter of law, constitute an independent violation of the Hobbs Act, I dissent from the denial of the petition for rehearing en banc.

The facts and procedural history of this case are provided in detail in the Supreme Court's decision in *Scheidler*. In short, in *Scheidler*, following a seven-week trial, a jury concluded that Scheidler and other individuals and organizations violated the civil provisions of RICO: the jury concluded that the defendants committed 21 violations of the Hobbs Act, 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 23 instances of attempting to violate the Travel Act, and four acts or threats of physical violence to any person or property.[1] The jury awarded plaintiff, the National Women's

[1] The plaintiffs acknowledge that the "acts or threats of physical violence" predicate acts were based on the Hobbs Act, 18 U.S.C. § 1951(a), and were not state law claims.

Health Organization of Delaware, Inc., $31,455.64, and the National Women's Health Organization of Summit, Inc., $54,471.28, with the damages trebled under RICO. The district court then entered an injunction prohibiting certain illegal protest actions. The defendants appealed to this court and this court affirmed. *National Org. for Women, Inc.* v. *Scheidler*, 267 F.3d 687 (7th Cir. 2001). The Supreme Court granted certiorari "to answer two questions. First, whether petitioners committed extortion within the meaning of the Hobbs Act, 18 U.S.C. § 1951. Second, whether respondents, as private litigants, may obtain injunctive relief in a civil action pursuant to 18 U.S.C. § 1964 of the Racketeer Influenced and Corrupt Organization Act (RICO)." *Id.* at 397.

On appeal, the Supreme Court first considered whether the defendants committed extortion within the meaning of the Hobbs Act. The Court held that the crime of extortion under the Hobbs Act required the defendants to obtain or to seek to obtain property. The Court then concluded: "Because we find that petitioners did not obtain or attempt to obtain property from respondents, we conclude that there was no basis upon which to find that they committed extortion under the Hobbs Act." *Id.* The Court did not end there, however, because "[t]he jury also found that petitioners had committed extortion under various state-law extortion statutes, a separate RICO predicate offense." *Id.* at 409. Thus, the Court considered whether the verdicts could stand based on the jury's findings of state law extortion. Again, the Court concluded "[b]ecause petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed." *Id.* at 410. Having disposed of the Hobbs and state extortion predicate acts, the Supreme Court then concluded that "[t]he 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But we have already determined that petitioners did not commit or attempt to commit extortion." *Id.* at 410.

Significantly, the Supreme Court then held: "Because *all* of the predicate acts supporting the jury's findings of a RICO violation *must be reversed*, the judgment that petitioners violated RICO *must also be reversed*. Without an underlying RICO violation, the injunction issued by the District Court *must necessarily be vacated*. We therefore need not address the second question presented – whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. § 1964. The judgment of the Court of Appeals is accordingly *Reversed*." *Id.* at 411 (emphasis added). The Supreme Court then entered an order stating "that the judgment of the above court in these cases is reversed with costs, and the cases are remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court." At that point, we should have closed the case.

But even with the Supreme Court's explicit holding that "*all* of the predicate acts supporting the jury's findings of a RICO violation *must be reversed*," and its directive that "the injunction issued by the District Court *must necessarily be vacated*," our court remanded this case to the district court for further proceedings, namely to determine "whether the four predicate acts involving 'acts or threats of physical violence to any person or property' are sufficient to support the nationwide injunction that it imposed." *Scheidler*, 2004 WL 375995, at *3. The panel reasoned that remand was necessary because the Supreme Court had not granted certiorari on that issue and, therefore, the question remained open. In my view, the order directly conflicts with the Supreme Court's opinion. It also rests on an impermissible reading of the Hobbs Act, and unnecessarily revives a case that is already more than eighteen years old.

Although the Supreme Court did not expressly consider whether the jury's finding of four predicate acts of violence to persons or property could support the jury's verdict on the plaintiffs' RICO claim, the Supreme Court clearly stated that "*all* of the predicate acts supporting the jury's finding of a

RICO violation *must be reversed.*" This unequivocal holding negates any reasonable inference that those four predicate acts remain an issue. The panel concludes otherwise by noting that the Supreme Court did not grant certiorari to resolve that issue.

But, the Supreme Court did specifically grant certiorari to consider the question of whether a private litigant in a civil RICO action is entitled to injunctive relief, but then found it unnecessary to address that question because there was no "underlying RICO violation . . . ." *Scheidler*, 537 U.S. at 411. This is significant because if the four threats or acts of violence claims remained viable, as the panel concludes and the plaintiffs argue, there would be an "underlying RICO violation," and it would have been necessary for the Supreme Court to address the second question for which it had granted certiorari. Yet, the Supreme Court expressly stated that because there was no underlying RICO violation, it was unnecessary to consider whether private litigants could obtain injunctive relief under RICO. *Id.* at 411. Thus, the panel's remand order, which allows for the possibility that there is still an "underlying RICO violation," is again inconsistent with the Supreme Court's opinion.

Moreover, although the Supreme Court did not grant certiorari to consider the state law extortion claims or the Travel Act claims, it nonetheless considered the validity of those claims, as they depended entirely on the Supreme Court's resolution of the extortion claims for which it had granted certiorari. *See Scheidler*, 537 U.S. at 410 ("The 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But we have already determined that petitioners did not commit or attempt to commit extortion."); *id.* ("Because petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed."). Similarly, as discussed below, the four predicate acts of violence to persons or property depend

on the viability of the extortion claims in this case. By holding that the defendants did not commit extortion, it necessarily follows that the four predicate acts also cannot support the RICO verdict. True, the Supreme Court expressly addressed the state law extortion claims and the Travel Act claims, but did not mention the four violence against person or property claims. But that is not surprising given that on appeal before the Supreme Court, the plaintiffs discussed those claims, and specifically argued that "even without the Hobbs Act predicates, the jury's verdict would stand on the 25 state extortion predicates." The plaintiffs, however, did not argue that the four predicate acts of violence against persons or property independently justified the jury's verdict. Therefore, the Supreme Court found no need to expressly address that question. But its holding that "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed . . ." is conclusive.

One could argue that the Supreme Court made a mistake when it stated that "*all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," and that "*[w]ithout an underlying RICO violation*, the injunction issued by the District Court must necessarily be vacated." *Scheidler*, 537 U.S. at 411 (emphasis added). But if so, the appropriate procedure would have been for the plaintiffs to seek rehearing from the Supreme Court. This court cannot ignore the Supreme Court's mandate merely because the Supreme Court might not have meant what it said.

Even assuming that the panel's remand order could be labeled a reasonable interpretation of the Supreme Court's opinion, the four predicate acts of violence to persons or property cannot, as a matter of law, constitute a violation of the Hobbs Act, as the plaintiffs argue. Specifically, the plaintiffs argue that the Hobbs Act make it illegal to interfere with interstate commerce by: (1) robbery, (2) extortion, or (3) physical violence. The plaintiffs' argument is misplaced, as the plain language of the Hobbs Act makes clear.

The Hobbs Act provides:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951.

The plain language of the Hobbs Act makes clear that it does not make threats of "physical violence to any person or property" illegal. Rather, it prohibits threats of "physical violence to any person or property *in furtherance of a plan or purpose to do anything in violation of this section*." Thus, for the four acts or threats of violence to constitute a violation of the Hobbs Act, they must have been for purposes of obstructing, delaying or affecting commerce "by robbery or extortion." *United States* v. *Yankowski*, 184 F.3d 1071 (9th Cir. 1999); *United States* v. *Franks*, 511 F.2d 25 (6th Cir. 1975). Yet, the Supreme Court held that the facts in this case did not support a finding of extortion, as a matter of law. (And the plaintiffs do not make a claim of robbery.) Accordingly, there is no possible Hobbs Act violation and the remaining four predicate acts, like the Travel Act claims, cannot, as a matter of law, support a RICO verdict.[2]

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[2] There is yet another reason that further proceedings on remand are unnecessary. In remanding the Hobbs Act question, the panel on rehearing instructs that "[i]f there is anything at all that is to be done, it must be based on the record that has already been built." Slip op. at 8. However, the record, as it currently exists, fails to establish that the four acts of violence involved interstate commerce. As the panel recognizes, slip op. at 13, the Hobbs Act violation must "affect [ ] commerce or the movement of any article or commodity in commerce." 18 U.S.C. § 1951(a). In this case, though, the jury did not determine that the four acts or violence affected commerce: The Special Interrogatories and Verdict Form did not ask the jury to decide separately whether each alleged predicate act involved interstate

Nonetheless, on rehearing the panel unnecessarily sets up a debate on the meaning of the Hobbs Act, positing as plausible two different interpretations of the Hobbs Act – what the panel dubs a "two-way" and a "three-way" interpretation. *Scheidler* slip op. at 9. Using the panel's jargon, a "two-way" interpretation of the Hobbs Act allows for only two independent ways to violate the Hobbs Act: 1) Robbery or 2) Extortion. The three-way interpretation, according to the panel, provides for a third: 3) Physical violence to any person or property.

Although the panel refuses to resolve the debate and instead "underscore[s] the fact that we have not, at this point, ruled either implicitly or explicitly on the Hobbs Act issue," slip op. at 7, the panel nonetheless states that "[g]rammatically, the text can be read either way without undue strain," *id.* at 9, and it concludes that "we see nothing absurd in the three-way interpretation the plaintiffs have urged." *Id.* at 16. However, contrary to the panel's conclusion, the three-way interpretation is not plausible given the plain language of the Hobbs Act. As explained above, the "physical violence to any person or property" clause of the Hobbs Act, states in its entirety: "or commits or threatens physical violence to any person or property in furtherance of a plan or purpose *to do anything in violation of this section*, . . ." Thus, the only way "physical violence" constitutes a violation of the Hobbs Act is if it (in addition to satisfying the interstate commerce requirement) is in furtherance of "robbery" or "extortion.["] *Yankowski*, 184 F.3d 1071; *Franks*, 511 F.2d 25. Clearly, under the Hobbs Act, physical violence to any person or property is confined to

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commerce. Rather, Special Interrogatory 8 asked whether "any of the acts that you found in Question 4 above affect[ed] interstate commerce?" The jury answered "yes" to that question, but the jury did not specify which of the acts listed in Interrogatory 4 included eight sub-components, (a)–(h), only one of which involved the acts or threats of physical violence to any person or property, which the remand order indicates remain viable. Because the jury did not specifically conclude that those acts affected interstate commerce, on the record as it stands, no Hobbs Act violation could exist.

furthering robbery or extortion. It does not stand alone as a separate violation. The full court should decide this clear question of law now, instead of presenting competing theories for the district court to resolve on remand.

Although an order for a reversal and remand from the Supreme Court is not the typical case for which *en banc* is appropriate, procedurally that is the only option available to the defendants before this court. Given the age of this case, remanding to the district court unnecessarily wastes additional judicial resources. Granted, it is hard to see how four acts of violence committed nearly twenty years ago – and well before Congress enacted the Freedom of Access to Clinic Entrances Act – would justify an injunction in 2005. It is likely and certainly appropriate that the district court will dispose of the case promptly on that basis. But even that most likely result requires additional resources of the parties and the judicial system. This is unnecessary because the Supreme Court's holding that there was no extortion means that no Hobbs Act violation possibly exists. Moreover, if the district court on remand somehow finds an injunction appropriate, then it will be required to choose between the two legal options the panel presents. The losing side would surely appeal, presenting the pure issue of law that this court would have resolved by now had we considered it en banc.

Absent a writ of mandamus from the United States Supreme Court, *see In re Blodgett*, 502 U.S. 236, 240-41 (1992) (denying a petition for the writ of mandamus directed toward the Ninth Circuit without prejudice, but stating that such relief would be available if the circuit court caused an unwarranted delay in the case's disposition), the defendants face an unnecessary remand. I therefore DISSENT from the denial of rehearing en banc. *Id.*

APPENDIX B

United States Court of Appeals,
Seventh Circuit.

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Plaintiffs-Appellees,
v.
Joseph M. SCHEIDLER, et al., Defendants-Appellants.

Nos. 99-3076, 99-3336, 99-3891, 99-3892, 01-2050.

Submitted Feb. 26, 2003.
Decided Feb. 26, 2004.

On Remand from the Supreme Court of the United States.

Before ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

ORDER

This case comes to us on remand from the Supreme Court of the United States.

In 1986, the National Organization for Women (NOW) and two health clinics that perform abortions ("plaintiffs"), filed this class action alleging that defendants, a coalition of antiabortion groups called the Pro-Life Action Network (PLAN), Joseph Scheidler, and other individuals and organizations that oppose abortion, engaged in conduct amounting to a pattern of extortion in violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). A more detailed account of the facts and the lengthy procedural history of this litigation is provided in the Supreme Court's first opinion in this case, *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994) (*NOW I*), and in our prior decisions, *National Organization for Women, Inc.* v. *Scheidler*,

267 F.3d 687 (7th Cir. 2001), and *National Organization for Women, Inc.* v. *Scheidler*, 968 F.2d 612 (7th Cir. 1992).

After the Court in *NOW I* remanded the case, the district court conducted a seven-week trial, at which the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. In response to special interrogatories, the jury found that the defendants or others associated with PLAN committed 21 violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), 25 violations of state extortion law, 25 instances of attempting or conspiring to commit either federal or state extortion, 23 violations of the Travel Act, 18 U.S.C. § 1952, 23 instances of attempting to violate the Travel Act, and four "acts or threats of physical violence to any person or property." On this basis, the jury awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants appealed a number of issues relating to the conduct of the trial and the issuance of the injunction. We affirmed the district court's judgment in all respects. *Scheidler*, 267 F.3d at 693.

The defendants then filed a petition for a writ of certiorari with the United States Supreme Court, which the Court granted with respect to two of the three questions presented by the petition. *Scheidler* v. *Nat'l Org. for Women, Inc.*, 535 U.S. 1016 (2002). Specifically, the Court limited its grant of certiorari to the following questions:

> 1. Whether the Seventh Circuit correctly held, in acknowledged conflict with the Ninth Circuit, that injunctive relief is available in a private civil action for treble damages brought under [RICO].
>
> 2. Whether the Hobbs Act, which makes it a crime to obstruct, delay, or affect interstate commerce "by robbery

> or extortion" [–] and which defines "extortion" as "the obtaining of property from another, with [the owner's] consent," where such consent is "induced by the wrongful use of actual or threatened force, violence, or fear" – criminalizes the activities of political protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there.

Pet. for Writ of Cert., 2002 WL 32134867 (U.S. Jan 28, 2002) (No. 01-1118) (internal citation omitted). In its opinion, the Court explained that it granted certiorari to determine "whether petitioners committed extortion within the meaning of the Hobbs Act" and "whether respondents, as private litigants, may obtain injunctive relief in a civil action" under RICO. *Scheidler* v. *Nat'l Org. for Women, Inc.*, 537 U.S. 393, 397 (2003) (*NOW II*). The Court held that "petitioners did not commit extortion because they did not 'obtain' property from respondents as required by the Hobbs Act," and this determination "renders insufficient the other bases or predicate acts of racketeering supporting the jury's conclusion that petitioners violated RICO." *Id.* It therefore "reverse[d] without reaching the question of the availability of private injunctive relief under § 1964(c) of RICO," *id.*, and held that "[w]ithout an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated," *id.* at 411.

On remand to this court, the parties submitted Statements of Position pursuant to Circuit Rule 54. Plaintiffs argue that, although the Court in *NOW II* disposed of the 117 extortion-based predicate acts under RICO, the defendants did not petition for a writ of certiorari on the four predicate acts involving "acts or threats of physical violence to any person or property" and, accordingly, the Court did not decide whether these acts alone could support the district court's injunction. In response, defendants contend that the Hobbs Act does not outlaw "physical violence" apart from extortion and robbery, and

therefore the Supreme Court's holding that the defendants did not commit extortion precludes a finding that the four acts or threats of violence might independently support the injunction. We remand to the district court to address the issue – which never before in this litigation has been the subject of full briefing or judicial consideration – in the first instance.

Although "[a]n order limiting the grant of certiorari does not operate as a jurisdictional bar," *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 246 (1981), the Supreme Court has consistently adhered to its Rule 14.1(a), which provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." See *Toyota Motor Mfg., Inc.* v. *Williams*, 534 U.S. 184, 202 (2002); *Glover* v. *U.S.*, 531 U.S. 198, 205 (2001). Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari, see, *e.g.*, *Lopez* v. *Davis*, 531 U.S. 230, 244 n.6 (2001); *West* v. *Gibson*, 527 U.S. 212, 223 (1999); *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 140 (1998), we will not presume that in this case it went beyond the scope of its grant of certiorari, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction. We note that the Court's opinion in *NOW II* makes no mention of these four predicate acts, and the parties' briefs before the Court reference these acts only in passing in footnotes. To conclude that the Court found these four predicate acts insufficient to support the district court's injunction would therefore require that we find both that the Court went beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion. We decline to draw such a conclusion.

Instead, we remand to the district court to determine whether the four predicate acts involving "acts or threats of physical violence to any person or property" are sufficient to support the nationwide injunction that it imposed. See *Glover*,

531 U.S. at 205 ("As a general rule . . . we do not decide issues outside the questions presented by the petition for certiorari. Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance." (citing Sup. Ct. R. 14.1(a))). As part of this inquiry, the court may find it necessary to interpret the language of the Hobbs Act, which provides that "[w]hoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both." 18 U.S.C. § 1951(a). Specifically, the court may need to determine whether the phrase "commits or threatens physical violence to any person or property" constitutes an independent ground for violating the Hobbs Act or, rather, relates back to the grounds of robbery or extortion. In the alternative, the court may conclude that the proper interpretation of § 1951(a) is immaterial, if it decides that the four acts or threats of physical violence found by the jury are not sufficient standing alone to support the nationwide injunction. As the parties' Circuit Rule 54 submissions offer only a preliminary discussion of these issues, and neither this court nor the district court has addressed them previously, we consider it best to remand the case to the district court.

We therefore REMAND this case to the district court for further proceedings consistent with *NOW II* and this order.

APPENDIX C

United States Court of Appeals
for the Seventh Circuit

Nos. 99-3076, 99-3336, 99-3891, 99-3892
and 01-2050

National Organization for Women, Inc., on behalf of itself and its women members and all other women who use or may use the services of women's health centers that provide abortions, and Delaware and Summit Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on behalf of themselves and the class of all women's health centers in the United States at which abortions are performed, Plaintiffs-Appellees,

v.

Joseph M. Scheidler, Pro-Life Action League, Inc., Andrew D. Scholberg, Timothy Murphy, and Operation Rescue, Defendants-Appellants.

Argued Sept. 14, 2000.
Decided Oct. 2, 2001.
Petition for Rehearing and Rehearing En Banc
Denied Oct. 29, 2001.

Before ROVNER, DIANE P. WOOD, and EVANS, Circuit Judges.

DIANE P. WOOD, Circuit Judge.

This case is in its fifteenth year of contentious litigation. The defendants are anti-abortion activists who employ a protest tactic they call "rescues," in which they and other activists physically block access to abortion clinics so that the patients and staff cannot get in or out of the buildings. Plaintiffs use words less benign than "rescue" to describe the defendants' activities. We will refer to them as "protest missions," in the hopes that this will be understood as a neutral term. The defendants' goal is frankly to prevent abortions from taking place. Participants in the protest missions engage in a substantial amount of protected speech, including efforts to persuade clinic patients not to have abortions and to persuade clinic doctors and staff to quit performing abortions. Unfortunately, the protest missions also involve illegal conduct: protesters do everything from sitting or lying in clinic doorways and waiting to be arrested to engaging in more egregious conduct such as entering the clinics and destroying medical equipment and chaining their bodies to operating tables to prevent the tables from being used. In a few instances, protesters apparently have physically assaulted clinic staff and patients. In addition to staging these protests, the defendants have issued letters and statements to other clinics threatening to stage missions at those clinics unless they voluntarily shut down.

The plaintiffs, the National Organization for Women (NOW) and two clinics that were the targets of protest missions, brought this class action alleging, among other things, that the defendants' conduct amounted to a pattern of extortion which violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO). The trial judge certified two classes: one, represented by NOW, of all NOW members and non-members who have used or would use the services of an abortion clinic in the United States, and a second of all such clinics. After a trip through this court to the Supreme Court of the United States during which many of the legal issues in the case were clarified or resolved, the case was remanded to the district court for trial of the plaintiffs' RICO claims. A jury

found for the plaintiffs and awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants have appealed a wide range of issues relating to the conduct of the trial and the issuance of the injunction. We find that the district court navigated its way through this complex and difficult case with care and sensitivity and affirm its judgment in all respects.

I

Many of the facts pertinent to this opinion are set out in the Supreme Court's decision remanding the case, *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994) (*NOW I*), and in our earlier decision in the case, *National Organization for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), and we will not recount them in detail here. Nonetheless, in order to put the defendants' appeal in context, a brief overview of the facts presented at trial and of the procedural history of the case may be helpful.

The individual defendants, Joseph Scheidler, Andrew Scholberg, and Timothy Murphy are on the Board of Directors of one of the corporate defendants, the Pro-Life Action League (PLAL). The other corporate defendant is Operation Rescue. (Randall Terry, the director of Operation Rescue, was also originally a defendant in the case, but he has since settled with the plaintiffs). All of the defendants were among the organizers of the Pro-Life Action Network (PLAN), which is a loose national organization of groups that engage in protest missions and other aggressive anti-abortion tactics. Beginning in the mid-1980's, PLAN held annual conventions, organized in part by the defendants here, which included seminars on protest strategies. Those conventions concluded with protest missions being staged in the convention city. PLAN also sent a newsletter to its members and coordinated a hotline that potential protesters could call to get information about upcoming missions. The

plaintiffs alleged, and at trial the jury found, that PLAN was an "organization or enterprise" for purposes of RICO liability.

Initially, the plaintiffs alleged that the defendants' tactics violated both RICO and federal antitrust law. In 1992, however, this court issued an opinion dismissing both theories of liability, reasoning that the antitrust laws were not applicable because the plaintiffs had not alleged that the defendants exercised any form of market control over the supply of abortion services and that RICO did not reach the defendants' conduct because the plaintiffs had not shown that the alleged racketeering acts were "economically motivated." 968 F.2d at 617-30. The Supreme Court granted certiorari on the limited question whether RICO requires proof that either the racketeering enterprise or the alleged predicate acts were motivated by an economic purpose. (The antitrust holding of our 1992 decision was thus left undisturbed.) The Court concluded that RICO contains no such economic motive requirement and therefore reversed our decision on that point. 510 U.S. at 256-62, 114 S. Ct. 798. Thereafter, we remanded the case to the district court for trial of the plaintiffs' RICO claims.

During the course of the seven-week trial, the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. The alleged predicate acts included violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), state extortion law, the federal Travel Act, 18 U.S.C. § 1952, and conspiracy to violate these laws. A few of the more egregious acts the plaintiffs alleged included:

At a protest mission in Chico, California, protesters pressed four clinic staff members up against a glass entranceway to the clinic for several hours and refused to let them go even when they complained they were being crushed. The glass wall eventually either loosened or shattered, injuring a clinic staffer.

At a similar mission in Los Angeles, protesters grabbed at a patient's arms and legs and tried to restrain her physically from entering the clinic. The patient was actually at the clinic for a follow-up to ovarian surgery, and the attack by the protesters reopened her incisions. As a result of the attack, the patient had to be rushed to the hospital.

In several instances, protesters entered clinics and destroyed medical equipment.

In several cases, protesters not only blocked doorways with their bodies, but chained themselves to the doorways of clinics, or, in some cases, to operating tables inside clinics.

In December 1985, defendant Scheidler sent letters to every abortion provider in the Chicago area calling for a "Christmas Truce." In these letters, he requested that the clinics shut down for a specific day in December, stated that he would "call to confirm" the clinic's decision, and warned that non-complying clinics would be subjected to "non-violent direct action," a catch-phrase PLAN and PLAL frequently used for their activities.

Based on this and other evidence in the voluminous record that was created at the trial, the jury found in response to special interrogatories that the defendants or others associated with PLAN committed 21 violations of the Hobbs Act, 25 violations of state extortion law, 25 acts of conspiracy to violate federal or state extortion law, four acts or threats of physical violence, 23 violations of the Travel Act, and 23 attempts to commit one of these crimes. The jury awarded damages to both clinics; once the damages were trebled, as RICO requires, the awards totaled over $163,000 to Summit Women's Health Organization and over $94,000 to Delaware Women's Health Organization.

After the jury returned its verdict, the district court held three days of additional hearings and then entered a permanent, nationwide injunction prohibiting the defendants or those acting in concert with them from interfering with the rights of the class clinics to provide abortion services, or with rights of the class

women to receive those services, by obstructing access to the clinics, trespassing on clinic property, damaging or destroying clinic property, or using violence or threats of violence against the clinics, their employees and volunteers, or their patients.

II

Initially, we must consider the defendants' contention that RICO does not permit private plaintiffs to seek injunctive relief. The only court of appeals to have addressed this issue directly, the Ninth Circuit, concluded in 1986 that private plaintiffs cannot seek injunctions under RICO, relying largely on the court's reading of the statute's legislative history. See *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986). The other courts of appeals that have addressed the point in *dicta* are split. Compare *Johnson v. Collins Ent'mt. Co.*, 199 F.3d 710, 726 (4th Cir. 1999), *In re Fredeman Litig.*, 843 F.2d 821, 828-30 (5th Cir. 1988), and *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28-29 (2d Cir. 1983) (expressing doubt about availability of injunctive relief for private plaintiffs), with *Bennett v. Berg*, 710 F.2d 1361, 1366 (8th Cir. 1983) (McMillan, J., concurring) (suggesting injunctive relief is available); see also *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990), *Northeast Women's Ctr. v. McMonagle*, 868 F.2d 1342, 1355 (3d Cir. 1989) (noting controversy but expressing no opinion on resolution). Our study of Supreme Court decisions since the 1986 *Wollersheim* opinion convinces us that the approach of the Ninth Circuit (which relied almost exclusively on the legislative history of RICO to reach its result, as opposed to the actual language of the statute) no longer conforms to the Court's present jurisprudence, assuming for the sake of argument that it was a permissible one at the time. We are persuaded instead that the text of the RICO statute, understood in the proper light, itself authorizes private parties to seek injunctive relief.

In interpreting the remedial provisions of the RICO statute, our inquiry begins with the statute's text, and, if the text is unambiguous, it ends there as well. See *Alexander v. Sandoval*, 531 U.S. 1049, 121 S. Ct. 1511, 1520-21 & n. 7, 149 L. Ed. 2d

517 (2001); *NOW I*, 510 U.S. at 261, 114 S. Ct. 798. RICO's civil remedies section provides, in pertinent part:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to . . . imposing reasonable restrictions on the future activities . . . of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, . . . or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. . . .

18 U.S.C. § 1964.

Both parties have offered interpretations of this text that support their positions. The plaintiffs read the statute in a straightforward manner. Section 1964(a), they contend, grants the district courts jurisdiction to hear RICO claims and also sets out general remedies, including injunctive relief, that all plaintiffs authorized to bring suit may seek. Section 1964(b) makes it clear that the statute is to be publicly enforced by the Attorney General and it specifies additional remedies, all in the nature of interim relief, that the government may seek. Section 1964(c) similarly adds to the scope of § 1964(a), but this time for private plaintiffs. Those private plaintiffs who have been

injured in their business or property by reason of a RICO violation are given a right to sue for treble damages. As the plaintiffs note, this reading of the statute gives the words their natural meaning and gives effect to every provision in the statute.

The defendants argue for a less intuitive interpretation. Relying on *Wollersheim*, they argue that § 1964(a) is purely a jurisdictional provision authorizing the district court to hear RICO claims and to grant injunctions to parties authorized by other provisions of the law to seek that form of relief. Section 1964(b), in the defendants' view, allows the Attorney General to institute RICO proceedings and authorizes the government to seek not only the relief described in that subsection, but also the relief described in § 1964(a). Section 1964(c) then provides a limited right of action for private parties. They read the two clauses of § 1964(c), however, as tightly linked provisions, under which private plaintiffs may sue *only* for monetary damages. The mention of this type of relief in the second clause must mean, the defendants argue, that by implication no other remedies, particularly injunctive remedies, are available. We cannot agree that this is a reasonable reading of the statute.

As an initial matter, we note that the *Wollersheim* decision apparently misreads § 1964(b) when it states that § 1964(b) explicitly "permits *the government* to bring actions for equitable relief." *Wollersheim*, 796 F.2d at 1082. Section 1964(b) does allow the government to seek equitable relief, but it specifically mentions only *interim* remedies. Although no one doubts that permanent injunctions are also available to the government, the government's ability to seek permanent, as opposed to interim, equitable remedies comes from the general grant of authority for district courts to enter injunctions found in § 1964(a), not from anything in § 1964(b). (The sentence "[t]he Attorney General may institute proceedings under this section" is in that respect the equivalent of the first clause in § 1964(c), which says "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any

appropriate United States district court. . . ." Neither one addresses what remedy the plaintiff may seek.) Given that the government's authority to seek injunctions comes from the combination of the grant of a right of action to the Attorney General in § 1964(b) and the grant of district court authority to enter injunctions in § 1964(a), we see no reason not to conclude, by parity of reasoning, that private parties can also seek injunctions under the combination of grants in §§ 1964(a) and (c).

In addition, we cannot agree with the defendants' contention that § 1964(a) is a purely "jurisdictional" statute, despite the Ninth Circuit's characterization of it in that way in *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1307 (9th Cir. 1992) (construing *Wollersheim* holding as jurisdictional). What § 1964(a) does is to grant district courts authority to hear RICO claims and then to spell out a non-exclusive list of the remedies district courts are empowered to provide in such cases. In that sense, § 1964(a) is strikingly similar to the statute the Supreme Court construed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). The statute at issue in *Steel Co.* provided that "[t]he district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." *Id.*, quoting 42 U.S.C. § 11046(c). Noting that "'[j]urisdiction' . . . is a word of many, too many, meanings," the Court held that it would be "unreasonable to read [the statute] as making all the elements of the cause of action under subsection (a) jurisdictional, rather than as merely specifying the remedial *powers* of the court, *viz.*, to enforce the violated requirement and to impose civil penalties." *Id.* This part of the *Steel Co.* holding supersedes any rationale to the contrary that the courts of appeals may have followed in earlier years. We find that it is applicable to RICO and that § 1964(a) both confers jurisdiction on the district courts and specifies certain remedial powers that the courts will have in cases brought before them.

Once we accept that § 1964(a) is not purely jurisdictional, but also describes remedies available under RICO, the defendants' position becomes untenable. In the defendants' view, despite the general provisions for equitable relief in § 1964(a), injunctive relief is not available to any particular plaintiff unless it is also provided by some other section of the statute. This reading renders § 1964(a)'s provision for injunctive relief a nullity. Because an alternative reading exists which gives meaning to every section of the statute, see *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992) ("courts should disfavor interpretations of statutes that render language superfluous"), we reject the defendants' approach.

The defendants' final textual argument springs from the maxim that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979). While we have no doubt that this is good advice as a general matter, we do not find it particularly helpful in this case. This is not a situation in which Congress has provided for a private damages remedy and has remained silent as to the availability of injunctive relief. Instead, Congress explicitly provided for injunctive relief in § 1964(a), although it did not specify in that section which plaintiffs can seek such relief. Given that the next two sections describe two types of plaintiffs, the government and private plaintiffs, and spell out additional remedies specific to each type, we find that the only logical conclusion is that Congress intended the general remedies explicitly granted in § 1964(a) to be available to all plaintiffs.

Although we would be confident resting our holding purely on the plain text of § 1964, we note that our interpretation is consistent with Congress's admonition that the RICO statute is to be "liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970). Adhering to this admonition, which "obviously seeks to ensure that Con-

gress' intent is not frustrated by an overly narrow reading of the statute," *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993), the Supreme Court has consistently rejected interpretations by the courts of appeals that would limit the scope of RICO actions in ways not contemplated by the text of the statute. See, *e.g.*, *Cedric Kushner Promotions, Ltd. v. King*, --- U.S. ---, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001) (rejecting argument that employee of corporation acting within scope of employment cannot be a "person" distinct from the corporation); *Salinas v. United States*, 522 U.S. 52, 61-66, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997) (rejecting requirement that conspiracy defendant himself has committed predicate acts); *NOW I*, 510 U.S. at 256-62, 114 S. Ct. 798 (rejecting requirement that enterprise have an economic motive); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (rejecting requirements that defendant has been convicted of predicate act and that plaintiff has suffered a "racketeering injury," as opposed to injury from mere predicate acts); *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) (rejecting argument that RICO enterprise must have legitimate as well as illegitimate aspects). RICO's liberal-construction clause has particular force, as the Supreme Court has stated, when we are construing § 1964, the civil remedy provision, because it is in this section that "RICO's remedial purposes are most evident." *Sedima*, 473 U.S. at 491 n. 10, 105 S. Ct. 3275. In keeping with the spirit of these cases, we decline to restrict the remedies available under RICO, when Congress has provided for broad equitable relief under § 1964(a).

Our interpretation of § 1964 is also in keeping with the underlying purposes of the RICO statute. As the Supreme Court recently noted, Congress in enacting RICO intended to "encourag[e] civil litigation to supplement Government efforts to deter and penalize the . . . prohibited practices. The object of civil RICO is thus not merely to compensate victims but to turn them into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, 528 U.S.

549, 557, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000). Recognizing that the statute gives private citizens the ability to seek injunctive relief as well as damages is fully consistent with this role for civil RICO litigation.

Perhaps realizing that the plain text of the statute strongly suggests that private plaintiffs can seek injunctions, the *Wollersheim* court relied heavily in its decision on two pieces of legislative history. First, the court noted that, during the floor debate on the bill in the House, Representative Steiger, the House sponsor of the bill, introduced an amendment that would have, among other things, made private plaintiffs' right to seek injunctive relief explicit. The amendment was withdrawn after another representative described it on the House floor as creating "an additional civil remedy." See *Wollersheim*, 796 F.2d at 1085-86. Second, the court noted that one year after the bill's passage, Congress failed to pass a bill introduced in the Senate with the same language as the Steiger amendment. See *id.* at 1086. From these two occurrences, the Ninth Circuit concluded that "in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision." *Id.*

Again, with respect, we cannot agree with the Ninth Circuit that these snippets of legislative history amount to the kind of "'clearly expressed legislative intent to the contrary'" that we would require to cast doubt on unambiguous statutory language. *NOW I*, 510 U.S. at 261, 114 S. Ct. 798. Even these excerpts do not unequivocally indicate that Congress intended private plaintiffs to be limited to damages remedies. As the *Wollersheim* decision itself notes, there are indications in the legislative history to the contrary. *Id.* at 1085. More importantly, however, although the *Wollersheim* court may well have made a reasonable decision in 1986 to rely on Congress's refusal to enact amendments to the statute, recent Supreme Court precedent teaches that this type of legislative history is a

particularly thin reed on which to rest the interpretation of a statute. See, *e.g.*, *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169-70, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001) ("Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. A bill can be proposed for any number of reasons, and it can be rejected for just as many others."); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."). Given the Court's reluctance in recent years to rely on the type of legislative history that underpins *Wollersheim*, we cannot agree with the Ninth Circuit's earlier view that this legislative history trumps the otherwise plain language of § 1964.

In a last effort to save their reading of the statute, the defendants urge us that certain differences between the language of RICO and the language of section 4 of the Clayton Act (on which RICO was based) demand the inference that no private right to injunctive relief exists under RICO. The Clayton Act, they note, provides private rights of action in two separate sections: one for damages in § 4, 15 U.S.C. § 15(a), and one for injunctive relief in § 16, 15 U.S.C. § 26. RICO, in contrast, has only one statutory section addressing civil remedies, and the only subsection that specifically talks about private actions mentions only damages. Defendants argue that Congress's failure to include in § 1964(c) language analogous to that in Clayton Act § 16 must mean that it did not intend to allow private parties to seek injunctions.

We reject this line of analysis for a number of reasons. First, the mere fact that the Clayton Act spreads its remedial provisions over a number of different sections of the U.S. Code[1]

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[1] The remedial provisions of the Clayton Act are actually spread over far

and RICO does not, adds little to our understanding of either statute. More importantly, the Supreme Court regularly treats the remedial sections of RICO and the Clayton Act identically, regardless of superficial differences in language. See, *e.g.*, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188-89, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997) (applying Clayton Act rule for accrual of cause of action to RICO); *Holmes v. SIPC*, 503 U.S. 258, 267, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992) (applying proximate cause rule to RICO). Since the Court has already determined that litigants other than the Attorney General may obtain broad injunctive relief under the Clayton Act, see *California v. American Stores Co.*, 495 U.S. 271, 110 S. Ct. 1853, 109 L. Ed. 2d 240 (1990), cases like *Klehr* and *Holmes* indicate that we ought to adopt the same interpretation with respect to RICO. Indeed, *American Stores* (which came to the Court from the Ninth Circuit) pointedly rejected the way in which the Ninth Circuit had relied on legislative history to limit the Clayton Act's textual grant of private injunctive relief. *Id.* at 285, 110 S. Ct. 1853. This in turn undercut *Wollersheim*, which had used the same methodology as the discredited *American Stores* opinion. For all these reasons, we find that § 1964 authorizes injunctive relief at the behest of both the Attorney General and private plaintiffs, authorizes interim measures when the Attorney General sues, and authorizes private treble damages only for private plaintiffs (and not the United States). The district court thus correctly concluded that RICO authorized the private plaintiffs here to seek injunctive relief.

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more than the two sections the defendants mention. In addition to §§ 4 and 16, the Clayton Act also includes (as codified) 15 U.S.C. § 15(b) (suits for actual damages brought by foreign governments), 15 U.S.C. § 15a (suits for treble damages brought by the United States for its own injuries to business or property), 15 U.S.C. § 15c (*parens patriae* suits brought by state attorneys general for treble damages on behalf of natural persons in the state), and 15 U.S.C. § 25 (actions for injunctive relief brought by the Attorney General).

III

With this much established, we may turn to the defendants' First Amendment arguments. All parties acknowledge that the defendants engaged in a substantial amount of protected speech during the protest missions and other anti-abortion activities, including picketing on public sidewalks in front of clinics and verbally urging patients not to have abortions. We entirely agree with the defendants that liability cannot constitutionally be imposed on them for this portion of their conduct. But the record is replete with evidence of instances in which their conduct crossed the line from protected speech into illegal acts, including acts of violence, and it is equally clear that the First Amendment does not protect such acts. As is true in many political protest cases, the defendants' protected speech was often closely intertwined with their unprotected illegal conduct. Nevertheless, we believe the district court adequately ensured that the jury's verdict was not based on activities protected by the First Amendment, and that the remedies it ordered also respected the line between protected expression and unprotected conduct.

The defendants' First Amendment arguments fall into two categories. First, they argue broadly that imposing liability on them on the basis of their protest activities violates the First Amendment. Second, they argue that, even assuming they could constitutionally be held liable for their alleged conduct, the jury instructions and verdict form in this case did not contain necessary First Amendment safeguards. Before we reach either of these arguments, we pause to consider the standard of review we should apply in analyzing the defendants' First Amendment claims.

The Supreme Court has repeatedly held that, in cases in which First Amendment concerns are implicated, reviewing courts have an obligation to conduct an "'independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United*

States, Inc., 466 U.S. 485, 499, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Although this maxim has been applied most often in cases reviewing the factual findings of lower courts, the Court in *Bose* noted that the rule is equally applicable "whether the factfinding function be performed in the particular case by a jury or by a trial judge." 466 U.S. at 501, 104 S. Ct. 1949. Citing this rule, the defendants urge that our review of their First Amendment challenges must be plenary.

As we have noted before, however, even though *Bose* calls for an "independent examination of the whole record," it is not entirely clear what this "plenary" review is supposed to entail. See *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987). In particular, it is not clear whether *Bose* requires an independent review only of the ultimate factual conclusion that the defendants' conduct fell outside the protection of the First Amendment, or whether this court is required to conduct a more searching review of "findings of underlying facts, evaluations of credibility, and the drawing of inferences." *Brown & Williamson*, 827 F.2d at 1128. In cases in which we are reviewing a jury verdict rather than the findings of a lower court, the question is even more complex, because we must somehow reconcile the defendants' First Amendment rights against the command of the Seventh Amendment that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. *Bose* itself involved review of facts found by the district court under Fed. R. Civ. P. 52(a), and thus the Court had no occasion to consider this problem. For a different reason, we conclude that it is not necessary here to decide whether or not a broader version of the re-examination of jury findings is permissible when First Amendment rights are at issue. Even assuming that the *Bose dicta* requires us to conduct a plenary review of all of the factual findings relevant to the First Amendment issues before us (which is the most favorable position we can take for

the defendants), we find that the jury's determinations are fully supported by the record.

A.

Protection of politically controversial speech is at the core of the First Amendment, and no one disputes that the defendants' speech labeling abortion as murder, urging the clinics to get out of the abortion business, and urging clinic patients not to seek abortions is fully protected by the First Amendment. See, *e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S. Ct. 753, 122 L. Ed. 2d 34 (1993). It is equally clear, however, that the First Amendment does not protect violent conduct, *Wisconsin v. Mitchell*, 508 U.S. 476, 484, 113 S. Ct. 2194, 124 L. Ed. 2d 436 (1993), nor does it protect threats, *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 773, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994), or language used to carry out illegal conduct, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949). Even when a defendant's conduct involves expressive elements, the government is free to regulate the non-expressive aspects of the conduct if such regulation is necessary to serve important government interests. *United States v. O'Brien*, 391 U.S. 367, 377, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). The protection of the plaintiffs' rights to seek and provide medical care free from violence, intimidation, and harassment is such an important government interest. See, e.g., *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 376, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997); *Madsen*, *supra*, 512 U.S. at 768, 114 S. Ct. 2516. As the Supreme Court has explained, "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection." *Roberts v. United States Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984).

In this case, the plaintiffs presented ample evidence that the individual defendants and others associated with PLAN engaged in illegal conduct that directly threatened an important governmental interest. The evidence presented at trial showed

that, at PLAN-sponsored events, protesters trespassed on clinic property and blocked access to clinics with their bodies, including at times chaining themselves in the doorways of clinics or to operating tables. At other times, protesters destroyed clinic property, including putting glue in clinic door locks and destroying medical equipment used to perform abortions. On still other occasions, protesters physically assaulted clinic staff and patients. In addition, defendant Scheidler, on behalf of defendants PLAL and PLAN, sent letters to class clinics threatening that they would be subjected to similar attacks if they did not cease performing abortions. In light of the protesters' conduct at other PLAN events, the district court correctly concluded that these letters were not protected political speech but constituted true threats outside the protection of the First Amendment.

Assuming that the defendants can be held liable for these incidents, all of which occurred under PLAN sponsorship, then the plaintiffs produced ample evidence of illegal conduct that may legitimately be regulated given the importance of the governmental interest in protecting the right to seek and provide medical care. In a case where a similarly important governmental interest is not present and the conduct in question has an expressive element, we do not disagree with the defendants that the First Amendment might well shield that particular conduct from being used as the basis for RICO liability. (We express this thought cautiously only because the balance between the strength of the government's interest and the degree to which conduct has an expressive element will vary from case to case.) In any event, this case presents no such problems. We are satisfied that the record here easily supports the jury's finding of liability.

At this point, the defendants shift their argument to a more personal one: maybe someone associated with PLAN was engaged in unprotected conduct, but the evidence did not establish that the defendants themselves were involved, as opposed to being involved exclusively in PLAN's protected

speech activities. In *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982), the Supreme Court noted that, where an organization engages in both protected speech and unprotected, illegal conduct, the First Amendment does not permit individuals to be held liable for the organization's illegal acts merely based on their association with the organization. *Id.* at 908-09, 102 S. Ct. 3409. Rather, in order to impose liability on an individual based on that individual's association with an organization, a plaintiff must show both that the organization itself, rather than just isolated members, possessed unlawful goals and that the individual defendant held a specific intent to further those illegal aims. *Id.* at 920, 102 S. Ct. 3409.

We agree that *Claiborne Hardware* is directly applicable to our case. Although the plaintiffs established that the individual defendants themselves participated in many of the incidents described during the trial, the plaintiffs also introduced evidence of many other incidents coordinated or orchestrated by PLAN for which they did not specifically show that the individual defendants themselves committed the illegal acts described. In order for the defendants to be held responsible for acts committed by other members of PLAN during PLAN-organized events, *Claiborne Hardware* required the plaintiffs to show that PLAN itself, and not merely isolated members, intended that the illegal acts occur, that the defendants were aware of PLAN's illegal aims, and that the defendants held a specific intent to further those aims through their association with PLAN.

Even though this is an exacting test, once again the record shows that the plaintiffs satisfied it in this case. All of the individual defendants who remain in the case were on the board of directors of PLAL. PLAL and Operation Rescue, the two remaining organizational defendants, were in turn the primary organizers of PLAN. The plaintiffs put into evidence numerous letters, newsletters, and other publications authored by defendant Joseph Scheidler, executive director of PLAL, and by Randall Terry, executive director of Operation Rescue, detailing

the activities planned for upcoming PLAN events. The activities detailed in these letters included blocking access to clinics and entering clinics to block passageways. As noted above, these types of protest activities are illegal conduct unprotected by the First Amendment. Similarly, the threatening letters to plaintiff clinics were sent on PLAL letterhead, signed by Scheidler, and specifically described the threat as coming from PLAN. The jury was entitled to conclude from this evidence that PLAN itself, not merely isolated members, held illegal aims.

It is also significant that all of the individual defendants were high-level leaders within PLAN, and as such they knew of PLAN's illegal aims and intended to further those aims. The record showed that defendant Scheidler personally organized and coordinated many of PLAN's activities. Defendants Scholberg and Murphy also participated in planning meetings for PLAN events at which illegal blockades were to take place and spoke at PLAN conventions designed to train protesters in the use of these tactics. The plaintiffs presented more than enough evidence to convince us that the individual defendants actively intended to further PLAN's illegal goals.

B.

Turning to the defendants' narrower First Amendment argument, the defendants contend that, regardless of whether there was sufficient evidence from which the jury could have found that they engaged in unprotected activities, the jury instructions and verdict form used by the trial court allowed the jury to find the defendants liable based solely on the defendants' protected speech. The verdict form that the district court used asked the following relevant questions:

> 1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?

2. Were the . . . defendants associated with PLAN? (See Jury Instruction No. 20 for the definition of "associated with.")

. . .

4. Did any Defendant, or any other person associated with PLAN, commit any of the [alleged predicate acts]?

The jury instruction to which the verdict form referred stated, in relevant part:

Jury Instruction No. 20: Plaintiffs must show that the defendant was "associated with" PLAN. That is, the defendant must have had some minimal association with PLAN and have known something about PLAN's activities as they relate to the illegal acts under RICO. It is not necessary that the particular defendant committed acts unlawful under RICO or was aware of all of the unlawful acts committed by the other people who were associated with PLAN. . . .

In the district court, the defendants objected to these instructions, arguing that they did not require the jury to find that the defendants harbored a specific intent to further PLAN's illegal aims, as required by *Claiborne Hardware*. The district court apparently agreed, because it added an additional jury instruction which stated:

Jury Instruction No. 30--Defendants' Liability for Acts of Others: Liability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence. In order to find the defendants liable, you must conclude that the enterprise, or those acting on behalf of the enterprise, directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives.

The defendants did not renew their objection to the jury instructions after the district court made this change. Nevertheless, in this court, the defendants have argued that, even with the additional instruction, the jury instructions did not

adequately protect their First Amendment rights, because the Claiborne Hardware standard was incorporated only into the jury instructions, not into the verdict form.

Initially, we note that by not renewing their objection to the jury instructions and verdict form after the district court added Instruction 30, the defendants at least implied that they were satisfied with the court's resolution of their objection. Accordingly, we are inclined to find that the defendants have waived any objection to those instructions on appeal. See *United States v. Jones*, 224 F.3d 621, 626 (7th Cir. 2000) (objection to jury instruction waived where defense counsel agreed to instruction at trial). Because this is a civil trial, not a criminal trial, there is no equivalent of "plain error" review for a challenge that is forfeited rather than waived. In the interest of absolute fairness, however, we will consider this point based on the earlier objections.

Our review of jury instructions is deferential, and we consider only whether the instructions, taken as a whole, adequately informed the jury of the applicable law. *Molnar v. Booth*, 229 F.3d 593, 602 (7th Cir. 2000). We are confident that these instructions did so. This jury could not have found the defendants liable without finding that the defendants themselves specifically intended to further PLAN's illegal aims. Jury Instruction 30 made this requirement explicit, and absent any indication to the contrary, we presume that jurors follow the instructions they are given. *Miksis v. Howard*, 106 F.3d 754, 763 (7th Cir. 1997). There is no requirement for a district judge to replicate every instruction on the verdict form itself. We are confident that the jurors followed their instructions, heeded Instruction 30 when they considered the questions on the special verdict form, and that nothing on the form misled or confused them or caused them to ignore their instructions.

IV

The last serious contention we must address is the defendants' argument that the injunction in this case is vague

and overbroad. The operative portion of the injunction reads as follows:

> Defendants . . . and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly:
>
> a. interfering with the right of any member of the Certified Class of Plaintiff Clinics to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of women to avail herself of the Plaintiff Clinics' services (including but not limited to abortion services), by:
>
> (1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic;
>
> (2) trespassing on the premises or the private property of any Plaintiff Clinic;
>
> (3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic;
>
> (4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic;
>
> b. aiding, abetting, inducing, directing, or inciting any of the acts enumerated in subsection a. of this paragraph (the "Acts") through any of the Defendants or through others; or
>
> c. Operating an enterprise through any of the Acts described above.
>
> This injunction does not prohibit or preclude activities that are constitutionally protected, including but not limited to the following conduct:

a. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic;

b. Making speeches on public property;

c. Speaking to individuals approaching the clinic;

d. Handing out literature on public property; and

e. Praying on public property.

This injunction shall bind Defendants . . . and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN.

The defendants raise two principal objections to the scope of the injunction. First, they complain that it contains a number of terms that are vague or indefinite, and that as such, it is likely to chill a substantial amount of protected speech. Second, the defendants charge that the injunction makes them liable for the conduct of persons they do not control and for actions they do not authorize or approve. We consider each of these contentions in turn.

First, we recognize that it is a delicate task to craft an injunction that prohibits illegal conduct when that conduct is closely tied to political protests and other protected activity. The court must tread carefully to avoid hampering protected speech. Here, we do not disagree with the proposition that some language in this injunction, taken in the abstract, is rather general. But the key question is: Compared to what? Any effort to deal with a case of this complexity will inevitably involve some imprecision. Many criminal statutes contain key terms such as the word "material" which are somewhat imprecise but have never been considered void for vagueness. The defendants in this case never proposed any alternative language for an injunction, despite several invitations from the district court to do just that, so the real question is whether the injunction the court entered is as precise as possible while still ensuring that the defendants' illegal activities are enjoined.

We are satisfied that the injunction drafted by the district court here has struck the proper balance and has avoided any risk of curtailing protected activities. By its terms, the injunction prohibits only illegal conduct – trespassing, obstructing access to clinics, damaging property, using violence or threats of violence, or aiding, abetting, inducing, directing, or inciting any of these acts. We do not find any ambiguity in the terms the district court used to describe the prohibited conduct, and as discussed above, none of this conduct is protected by the First Amendment.

Although we do not believe that the terms of the injunction would reach protected speech in any case, the injunction itself includes an additional safeguard. A specific provision underscores that it does not prohibit peaceful picketing, speeches, or praying on public property, attempts to speak with patients and staff, handing out literature, or any other activity protected by the First Amendment. Given this explicit language, there can be no doubt that this injunction reaches only unprotected, illegal conduct, not protected speech. The defendants' alarmist prediction that, under the terms of the injunction, a protester who engages in "months of peaceful picketing" and then takes "two accidental footsteps onto private property" could be subject to contempt proceedings not only for trespass but also for the picketing is pure fancy and bears no relation to the actual wording of the injunction.

Nor do we find that the injunction impermissibly holds the defendants responsible for the actions of persons beyond their control. The injunction applies only to the defendants and to persons working in "active concert" with the defendants or in concert with PLAN. For that reason alone, the injunction's sweep is not so broad as the defendants suggest. Activists and protesters not closely associated with the defendants or with PLAN, an organization the defendants control, are not affected by the injunction. (This takes care of the specter of renegades who, the defendants assert, are utterly beyond their control.) Moreover, to the extent the injunction reaches the conduct of

individuals not named in this lawsuit, the order enjoins those individuals from violating its mandates. If individuals acting in concert with the defendants or PLAN violate the injunction, without inducement or direction by the defendants, the violators, not the defendants, would be in contempt of the court's order. Nothing in the order purports to hold the defendants liable for actions they do not direct, incite, or control.

The injunction as it is written is narrowly tailored to prohibit the specific types of illegal conduct that the defendants have engaged in on past protest missions. As such, it does not threaten the defendants' First Amendment rights. We are confident that the district court will take as much care in enforcing the injunction as it plainly took in crafting it. Indeed, with its explicit protection of peaceful picketing, speech, literature, and prayer, perhaps in the end the injunction may further rational discourse on one of the most volatile political controversies facing the nation today. Violence in any form is the antithesis of reasoned discussion. By directing those with passionate views about the abortion controversy – on either side – away from the use of threats and violence and back to "all the peaceful means for gaining access to the mind," the injunction the district court issued is in harmony with the fundamental First Amendment protection of free speech.

V

The defendants have raised a hodgepodge of other challenges to the judgment, none of which need detain us long. First, the defendants point out that in the plaintiffs' First and Second Amended Complaints (which were filed before the first set of appeals in the case) only the clinic plaintiffs alleged RICO claims; NOW joined only the counts alleging antitrust violations. As noted above, when the Supreme Court granted certiorari to review our earlier decision in this case, that grant was limited to questions concerning the RICO counts. The antitrust claims fell out of the case after the Court declined to review our decision with respect to them. According to the defendants, once all the counts to which NOW was a party fell

out of the case, the effect was the same as a final judgment against NOW, and *res judicata* barred the plaintiffs from amending their complaint to include NOW as a plaintiff in the RICO counts. The district court, however, permitted the plaintiffs to file a Third Amended Complaint, after remand from this court, which included NOW as a plaintiff in the RICO counts.

Whether to allow amendments to a complaint is a question committed to the discretion of the trial court. *Bethany Pharmacal Co. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001). Contrary to the defendants' assertion, there was no final judgment in this case after the Supreme Court's decision to which *res judicata* principles could apply. The case was still pending, first in this court and then in the district court. As a general rule, amendments to complaints are liberally allowed up to and even after trial, judgment, and appeal. See *United States v. Security Pac. Bus. Credit, Inc.*, 956 F.2d 703, 707-08 (7th Cir. 1992); see also *Guse v. J.C. Penney Co.*, 570 F.2d 679, 680 (7th Cir. 1978) (even after plaintiff lost on appeal, there was no final judgment against plaintiff, and district court was free to allow plaintiff to file amended complaint putting forth new legal theory). The Supreme Court made it clear in its opinion that it was evaluating the complaint only on the pleadings, see 510 U.S. at 256, 262, 114 S. Ct. 798, which is the most preliminary stage of proceedings one can imagine. The district court was thus well within its discretion in allowing NOW to continue as a plaintiff for the RICO claims in the Third Amended Complaint.

The defendants also argue that the clinics' claims are barred by *res judicata*. While this case was pending, one of the plaintiff clinics, Summit Women's Health Organization, filed suit in state court in Wisconsin seeking an injunction against Scheidler and several other defendants to prevent PLAN from engaging in illegal blockades during a PLAN convention in Milwaukee. The Wisconsin courts ultimately dismissed that lawsuit without prejudice as to most of the defendants.

However, before the case was dismissed, Scheidler and the Summit Women's Health Organization entered into a settlement agreement that specified that "all claims against [Scheidler] relating to conduct which occurred prior to the signing of this stipulation are hereby dismissed as to [Summit] with prejudice." The defendants argue that, because the claims that Summit raises in this case had already accrued at the time Summit entered into this stipulation, Summit is barred from bringing these claims in this lawsuit.

We need not consider what preclusive effect the Wisconsin settlement might have, because the defendants waived this issue in the district court. *Res judicata* is an affirmative defense that is waived if a party does not plead it. Fed. R. Civ. P. 8(c). Under the local rules of the Northern District of Illinois, the defendants were required to list all their defenses in their trial brief, and any defenses not listed were waived. The defendants admit that they did not list *res judicata* based on the Wisconsin litigation as an affirmative defense in their trial brief, and accordingly they have lost the opportunity to argue that issue here. Although we find that this claim is waived, we also note that, even if it were not waived and if the Wisconsin settlement had a preclusive effect in this case, the preclusion could run only between Summit and Scheidler and would not affect any of the other plaintiffs, including the class members, or any of the other defendants. The injunction would not be affected, all of the defendants would remain jointly liable for the damages to Delaware Women's Health Organization, and all of the defendants except Scheidler would remain liable to Summit. The practical effect of any preclusion would therefore be negligible.

The defendants have also urged this court to decertify the two classes, arguing that NOW and the named clinics are inadequate class representatives. The defendants particularly object to the district court's decision to include in the NOW class women who are not members of NOW, arguing that because NOW is a partisan advocacy group and the issues

involved in this case concern a matter of great social controversy, NOW is likely to have interests antagonistic to the views of some members of the class. Class certification decisions are committed to the discretion of the district court, however, see *Chavez v. Illinois State Police*, 251 F.3d 612, 629 (7th Cir. 2001), and we find that the district court's decision to certify the two classes here was well within the court's discretion. It is inaccurate in any event to imply that the district court certified a class of "all women." The court did no such thing. Instead, it certified a class that included only those women, whether or not members of NOW, whose right to seek abortion services has been or will be interfered with by the defendants. In order for these women's interests to be antagonistic to the claims NOW is bringing, the defendants would have to argue that at least some women in the class want to seek abortion services, but do not want to be free from harassment and intimidation while doing so. This scenario strikes us as exceedingly unlikely; at the very least, we agree with the district court that it "is clearly speculative and projects personally held views onto the plaintiff class." *National Organization for Women, Inc. v. Scheidler*, 172 F.R.D. 351, 362 (N.D. Ill. 1997).

As to the defendants' more general arguments that the named plaintiffs have not performed adequately as class representatives, we note that the named plaintiffs have pursued this litigation diligently for fifteen years, through a trip to the Supreme Court of the United States and a seven-week trial, and ultimately were successful in securing a nationwide injunction against the defendants prohibiting the conduct they set out to challenge. Given this record of performance, we cannot say that the district court in any way abused its discretion in certifying these classes.

The defendants have also argued that the conduct in which they engaged is not prohibited by RICO for a number of reasons. First, the plaintiffs alleged as predicate acts numerous violations of the federal extortion statute, the Hobbs Act, 18

U.S.C. § 1951, and the defendants argue that the Hobbs Act does not apply to their conduct. The defendants' primary contention on this point is that the Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," and that the things the plaintiffs claim were taken here – the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses – cannot be considered "property" for purposes of the Hobbs Act. However, this circuit has repeatedly held that intangible property such as the right to conduct a business can be considered "property" under the Hobbs Act, see, *e.g., United States v. Anderson*, 716 F.2d 446, 450 (7th Cir. 1983), and we will not revisit that holding here.

In a similar vein, the defendants assert that, even if "property" was involved, the defendants did not "obtain" that property; they merely forced the plaintiffs to part with it. Again, this argument is contrary to a long line of precedent in this circuit holding that "as a legal matter, an extortionist can violate the Hobbs Act without either seeking or receiving money or anything else. A loss to, or interference with the rights of, the victim is all that is required." *United States v. Stillo,* 57 F.3d 553, 559 (7th Cir. 1995).

In addition to their challenges to the application of the Hobbs Act, the defendants argue that the district court erred in giving the jury a generic instruction describing the elements of the state law extortion offenses the plaintiffs alleged as additional predicate acts. According to the defendants, there are substantial differences in the extortion laws of the states in which these alleged predicate acts occurred, and the district court's attempt to cover all the relevant state laws with a single, generic instruction impermissibly discounted these differences. Without expressing an opinion on whether this approach was permissible, we simply note that, if any error occurred, it was harmless. The jury found that the defendants committed 21

predicate acts under the Hobbs Act alone, which is far in excess of the two predicate acts that RICO requires. In the face of this finding, any error in the state extortion law instructions, which could at most have affected the jury's decision on the additional state-law predicate acts it found, could not have had any effect on the outcome of this case.

Finally, while this appeal was pending, the defendants filed motions in the district court seeking relief from the judgment under Rules 60(b)(2) and (3). The district court denied the motions, and the defendants appealed. We consolidated that appeal with this case and suspended briefing on the 60(b) issues. We have reviewed the defendants' motions in the trial court and the trial court's resolution of those issues, and we conclude that no further briefing on the issues is necessary.

"Rule 60(b) relief is an extraordinary remedy granted only in exceptional circumstances." *Rutledge v. United States*, 230 F.3d 1041, 1052 (7th Cir. 2000). Our review of the district court's decision denying relief is deferential, and we will reverse only if the district court has abused its discretion. *J & W Fence Supply Co. v. United States*, 230 F.3d 896, 898 (7th Cir. 2000). We find no abuse of discretion in this case. In their 60(b) motions, the defendants argued that they had newly discovered evidence relating to two specific incidents described by witnesses during the trial. In addition, the defendants posited that newly discovered evidence called into doubt whether an anonymous witness who testified at the trial in fact needed to remain anonymous. The district court denied the motions on the grounds that the defendants had documents in their possession from which they could have discovered most of the "new" evidence for well over a decade, and that relief at this late date accordingly was not warranted. In addition, the court noted that it was very unlikely that any of the "new" evidence, if admitted at trial, would have had any impact on the jury's verdict. Given that Rule 60 motions cannot be used to present evidence that with due diligence could have been introduced before judgment, *Rutledge*, 230 F.3d at 1052, or to put forth evidence that is not

material or that would likely not change the result at trial, *Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 732 (7th Cir. 1999), we find no error in the district court's denial of relief.

We have considered all of the defendants' remaining contentions, but find none that requires comment. For the foregoing reasons, the judgment of the district court is AFFIRMED in all respects.

APPENDIX D

United States District Court,
N.D. Illinois,
Eastern Division.

NATIONAL ORGANIZATION FOR WOMEN, INC., and its women members and other women who use or may use the services of women's health centers that provide abortions; Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on behalf of themselves and all other similarly-situated clinics, Plaintiffs,

v.

Joseph M. SCHEIDLER; Pro-Life Action League, Inc.; Randall A. Terry; Andrew Scholberg; Conrad Wojnar; Timothy Murphy; Monica Migliorino; Vital-Med Laboratories, Inc.; Project Life; and Operation Rescue, Defendants.

No. 86 C 7888.
July 25, 1995.

MEMORANDUM OPINION AND ORDER

COAR, District Judge.

Background

This nine-year-old case has a long and convoluted history, portions of which must be reviewed in order to understand the issues before the court. For a more detailed exposition of the facts and procedural history of this case, please refer to *NOW v. Scheidler*, 508 U.S. 971, 113 S. Ct. 2958, 125 L. Ed. 2d 659 (1993).

In 1986, plaintiffs National Organization for Women ("NOW"), and two women's health centers brought this action against various anti-abortion activists, anti-abortion

organizations, and a pathology testing laboratory. They alleged that defendants conspired to drive out of business health centers that provide abortion services. Plaintiffs contended that defendants committed extortion, engaged in physical and verbal intimidation, destroyed property, orchestrated phone campaigns to tie up clinic phone lines, made false appointments at the clinics, and disrupted the clinics' relationship with their landlords – all in violation of the Sherman Antitrust Act and sections 1962(a), (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Plaintiffs also raised several pendent state claims.

On May 28, 1991, the district court dismissed the Second Amended Complaint. *NOW v. Scheidler*, 765 F. Supp. 937 (N.D. Ill. 1991). The court held the Sherman Act inapplicable to the conduct alleged in the complaint because defendants' conduct was incidental to a valid effort to influence governmental action and therefore immune. The court dismissed the § 1962(a) RICO claim because defendants' receipt of donations from supporters was not income derived from racketeering. The § 1962(c) RICO claim was dismissed because the court concluded that RICO requires that economic motive be alleged. The RICO conspiracy count was dismissed because all substantive RICO counts failed. The state law claims were also dismissed because the dismissal of the claims based on federal law destroyed the basis for jurisdiction over the state law claims. The plaintiffs appealed.

On June 29, 1992, the Court of Appeals for the Seventh Circuit affirmed the district court's dismissal. *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992). The plaintiffs sought and obtained a writ of certiorari from the United States Supreme Court limited to the question of whether a RICO violation required motivation by an economic purpose. *NOW v. Scheidler*, 508 U.S. 971, 113 S. Ct. 2958, 125 L. Ed. 2d 659 (1993).

On January 24, 1994, the Supreme Court reversed. *NOW v. Scheidler*, 510 U.S. 249, 114 S. Ct. 798, 127 L. Ed. 2d 99

(1994). The Court held that RICO does not require proof that either the alleged racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose. In a concurring opinion, Justice Souter emphasized that although the First Amendment does not require reading an economic motive into the unambiguous RICO statute, legitimate free speech issues may be implicated in this case. Justice Souter advised that those concerns should be addressed as they arise. The defendants petitioned for a rehearing, which was denied on March 21, 1994. *NOW v. Scheidler*, 510 U.S. 1215, 114 S. Ct. 1340, 127 L. Ed. 2d 688 (1994).

On October 3, 1994, in an unpublished opinion, the Seventh Circuit recapitulated the Supreme Court's opinion. The Court of Appeals directed the district court to address the issue of whether the predicate acts alleged in the complaint in fact violated the Hobbs Act (18 U.S.C. § 1951). The court specifically reaffirmed its original dismissal of the Sherman Act count and RICO § 1962(a). The court further stated:

> The Supreme Court's decision reinstated count 3 (RICO § 1962(c)) and count 4 (RICO § 1962(d)). Counts five, six, and seven, which allege violations of state law, survive as well pursuant to the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367.
>
> Also on remand, if necessary, the district court should consider which of the defendants' activities, as alleged, are protected by the First Amendment to the United States Constitution. *See Scheidler*, 510 U.S. at --- n. 6, 114 S. Ct. at 806 n. 6. As Justice Souter pointed out in his concurring opinion, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Id.* at ---, 114 S. Ct. at 807 (Souter, J., concurring). This includes Hobbs Act extortion – the sole RICO predicate act alleged by plaintiffs in both their complaint and their RICO Case Statement.

NOW v. Scheidler, 25 F.3d 1053, 1994 WL 196761 (7th Cir. 1994). The case was remanded to the district court for further proceedings.

Before the district court could comply with the mandate of the Court of Appeals, the plaintiffs filed a motion for leave to file a third amended complaint. On October 21, 1994, Judge Holderman granted plaintiffs' motion and ordered plaintiffs to file an updated RICO case statement (Tr. p. 31). The Third Amended Complaint (hereinafter the "Complaint") has four counts.

Count I of the Complaint is brought by all plaintiffs[1] and alleges violations against all defendants except Vital-Med Laboratories, Inc. ("Vital-Med").[2] Count I also alleges that the defendants violated RICO by participating in the Pro-Life Action Network ("PLAN"), which the plaintiffs allege is an enterprise as defined by 18 U.S.C. § 1961(4). Several distinct predicate acts are alleged under count I. These acts include attempted arson, murder, and various Hobbs Act violations. Count II of the Complaint alleges that all defendants except Vital-Med conspired to violate the RICO Act. Count III is brought by DWHO and Summit and alleges that defendants Scheidler, Scholberg, Murphy, Migliorino, Wojnar, and PLAL tortiously interfered with the plaintiffs' prospective economic advantage. Count IV is brought by Summit alone and alleges that defendant Migliorino tortiously interfered with an existing business relationship between Summit and Summit's

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[1] The plaintiffs in this action are: NOW, on behalf of itself and its members and others who use or may use the services of women's health centers that provide abortions, the Delaware Women's Health Organization, Inc. ("DWHO"), and Summit Women's Health Organization, Inc. ("Summit"), on behalf of themselves and similarly situated clinics.

[2] The other defendants in this action are Joseph Scheidler ("Scheidler"), the Pro-Life Action League ("PLAL"), Randall Terry ("Terry"), Andrew Scholberg ("Scholberg"), Conrad Wojnar ("Wojnar"), Timothy Murphy ("Murphy"), Monica Migliorino ("Migliorino"), Project Life, and Operation Rescue.

prospective lessor. Count V is brought by DWHO and Summit against only Vital- Med for breach of duty of confidentially.

This case was transferred to the undersigned by Executive Order dated November 8, 1994. On February 7, 1995, this court denied several sanctions motions and motions to reconsider the grant of leave to file a Third Amended Complaint. *NOW v. Scheidler*, 1995 WL 59228 (N.D. Ill. 1995).

Defendants now move to dismiss the Third Amended Complaint. [Docket numbers 768, 774, 776, 784, 787]. All motions are fully briefed and ripe for decision. Although the Defendants have filed separate motions and replies, the motions raise similar, though not identical, issues. To the extent possible, the court will address the various Defendants' arguments together. However, several of the arguments do not lend themselves to one coherent treatment.[3]

I. Res Judicata

Defendants make two res judicata arguments. First, they allege that NOW is barred from being a plaintiff under the Third Amended Complaint because it suffered a final dismissal of its claims under the Second Amended Complaint. Second, Wojnar argues that he has obtained a final dismissal of all claims alleged against him and, therefore, res judicata should protect him from having to further defend himself in this litigation.

Res judicata is a judicial doctrine designed to ensure the finality of judicial decisions. *Brown v. Felsen*, 442 U.S. 127,

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[3] It appears that the Defendants have taken advantage of their status as co-defendants and allowed one group of defendants to "carry the torch" on each individual argument thereby saving the co-defendants' limited 15-page brief space for other arguments. To the extent possible, the court will identify the parties who concur or adopt their co- defendants' positions. However, this type identification is difficult, as some defendants have endorsed their co-defendants' arguments with a single sentence. The court has addressed all meritorious arguments made by the parties, and identifies the individual defendant proponents merely to ease the task of those who will undoubtedly review the record in the future.

131, 99 S. Ct. 2205, 2209, 60 L. Ed. 2d 767 (1979); *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir. 1986). It is a "rule of fundamental and substantial justice," *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S. Ct. 506, 507, 61 L. Ed. 1148 (1917); *Car Carriers*, 789 F.2d at 593, whose enforcement is essential to the maintenance of social order, "for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if . . . conclusiveness did not attend the judgments of such tribunals." *Alexander v. Chicago Park District*, 773 F.2d 850, 853 (7th Cir. 1985) (*quoting Nevada v. United States*, 463 U.S. 110, 129, 103 S. Ct. 2906, 2917-18, 77 L. Ed. 2d 509 (1983)).

Res judicata, also called claim preclusion, bars the same parties or their privies from relitigating any issue that was raised in a prior judgment or could have been raised in the prior action. *Alexander*, 773 F.2d at 853; *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981); *see* Jack Friedenthal, Mary Kay Kane, Arthur Miller, *Civil Procedure* 610 (1993). As the Court of Appeals explained in *Alexander*:

> Preclusion occurs under two theories: issue preclusion and claim preclusion. Claim preclusion bars relitigation of claims or issues which were or could have been raised in a prior suit on the merits between the same parties or their privies. Plaintiffs' claims are merged in the judgment for plaintiff while judgment for defendants acts to bar any further claims by plaintiff against the defendant. It is usually referred to as res judicata. . . . Issue preclusion prevents relitigation of a matter of fact of law that was previously litigated and decided. *See Jones v. City of Alton*, 757 F.2d 878, 879 n. 1 (7th Cir. 1985). It is usually referred to as collateral estoppel.

Alexander, 773 F.2d at 853.

Res judicata promotes accuracy (leaving in place properly decided cases), efficiency ("it is in the interest of the state that there be an end to litigation"), and fairness ("no person should

be twice vexed by the same claim"). Friedenthal, *et al.*, *Civil Procedure* 617 (1993), *see* Robert Ziff, Note, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 Cornell L. Rev. 905, 910 (1992).

A. Legal Standard for Res Judicata

There are three threshold requirements to be considered in applying res judicata: (1) identity of the parties or their privies; (2) identity of the causes of action; and (3) a final judgment on the merits. *Car Carriers*, 789 F.2d at 595 n. 9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). A court must find each of these threshold requirements in order to apply res judicata as a bar.

The doctrine of res judicata is generally applied to a single "cause of action." The Court of Appeals in this circuit employs the "same transaction" test to define a "cause of action." *Car Carriers*, 789 F.2d at 593; *Alexander*, 773 F.2d at 854; *Wakeen v. Hoffman House, Inc.*, 724 F.2d 1238, 1241 (7th Cir. 1983). Under the same transaction test, a "cause of action" consists of a " 'single core of operative facts' which would give rise to a remedy." *Car Carriers*, 789 F.2d at 593 (quoting *Alexander*, 773 F.2d at 854). The "same transaction" test is fact-oriented, and provides that once a transaction has caused injury, all claims arising from that transaction must be brought in the same suit or be lost. *Car Carriers*, 789 F.2d at 593.

B. Applicability of Res Judicata to the Parties

1. NOW

Defendants Terry, Project Life, and Operation Rescue (hereinafter the "Terry Defendants") and Defendants Scheidler, Scholberg, Murphy, and PLAL (hereinafter the "Scheidler Defendants") argue that res judicata bars NOW, and only NOW, from bringing RICO claims against them. The Terry Defendants argue that NOW suffered a final, undisturbed judgment when the Second Amended Complaint was dismissed. They argue that in the Second Amended Complaint, NOW

claimed injury only under the Sherman Act and that the dismissal of the Sherman Act claims was undisturbed by the Supreme Court. Accordingly, the Terry Defendants claim that res judicata bars NOW from asserting a new claim arising from the same set of operative facts after a final decision on the merits of the original claim. Thus, they argue, under the "same transaction" test, NOW should be precluded from prosecuting the Third Amended Complaint.

The plaintiffs argue that NOW did allege RICO claims in the Second Amended Complaint, and that those claims remain viable after the Supreme Court's reversal of the prior orders of dismissal. Thus, the first task is to determine whether NOW was a plaintiff as to the RICO counts in the Second Amended Complaint. If the answer is yes and those counts were revived by the decision of the Supreme Court, res judicata is not applicable because there has been no final decision on the merits. This determination is made difficult by the fact that not every named plaintiff made claims against every named defendant in the Second Amended Complaint.

Before turning to the specific language relied upon by the parties, a description of the layout of the Second Amended Complaint is helpful. Paragraphs one through three are contained in a subsection of the complaint titled "NATURE OF THE ACTION." Paragraph four deals with jurisdiction. Paragraphs five through eight are captioned "PLAINTIFFS." Paragraphs nine through twenty appear under a "DEFENDANTS" heading. Paragraphs twenty-one through thirty-seven describe "CLASS ALLEGATIONS." Paragraphs thirty-eight through fifty-five are captioned "FORMATION OF THE PRO-LIFE ACTION NETWORK." Paragraphs fifty-six through sixty-three explain the "CARRYING OUT OF PLAN'S AGENDA: OPERATION RESCUE." Paragraphs sixty-four through seventy-eight appear under a "THEFT OF FETAL REMAINS" caption. Paragraph seventy-nine is the beginning of the actual substantive counts of the complaint; each count realleging the facts contained in the previous paragraphs. Over

half the allegations in the complaint are not contained within a "count." This makes interpretation of the complaint difficult because, as will become clear, the complaint contains both specific allegations brought by specific defendants *as well as* general allegations which, read alone, do not always make clear which plaintiff is making the assertion.

In the first paragraphs under the RICO counts subheadings (counts II, III, and IV) the Second Amended Complaint states that the counts were brought by "plaintiffs DWHO and Summit and the class they represent." (Second Am. Compl. §§ 94,[4] 106,[5] 111[6]). NOW takes the position that paragraphs one, three, twenty-two, 105, and 110 of the Second Amended Complaint support its conclusion that it was a RICO plaintiff in the Second Amended Complaint.

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[4] Paragraph 94 alleges:

> Count II is brought against the defendants Scheidler, Terry, Scholberg, Murphy, PLAL, OR, and the Project (the "RICO Defendants") by plaintiffs DWHO and Summit and the class they represent, which reallege paragraphs 1 through 78.

[5] Paragraph 106 provides:

> Count II is brought against the RICO Defendants and defendant Migliorino by plaintiffs DWHO and Summit and the class of clinics they represent, which reallege paragraphs 1 through 78, and 95 through 105.

[6] Paragraph 111 alleges:

> Count IV is brought against the RICO defendants by plaintiffs DWHO and Summit and the class of clinics which they represent, which reallege paragraphs 1 through 78, 95 through 105, and 107 through 110 above.

Paragraph one[7] outlines the law to be used to justify the relief sought: to obtain declaratory and injunctive relief. Paragraph one thus logically encompasses both the alleged RICO violations and the alleged Sherman Act violations (because both such allegations are made later in the complaint under specific counts) by stating "this is a civil action pursuant to . . . the Sherman Antitrust Act . . . [and] . . . RICO." Thus, paragraph one *does* identify NOW as a plaintiff, but not *necessarily* as a RICO plaintiff.

Paragraph three[8] is no more enlightening. This paragraph does not identify which count it refers to and does no more than explain that NOW believed it had organizational standing to sue under the Sherman Act (see *infra*). Nothing in the paragraph could be logically construed to support plaintiffs' allegation that NOW was a RICO plaintiff.

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[7] Paragraph one provides:

> This is a civil action pursuant to section 16 of the Clayton Act, 15 U.S.C. Section 26, and section one of the Sherman Antitrust Act, 15 U.S.C. Section 1; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1962; and state law. Plaintiffs seek declaratory and injunctive relief and damages from defendants who have conspired, among themselves and with others to drive women's health centers that perform abortions out of business through a pattern of concerted, unlawful activity.

[8] Paragraph three states:

> The National Organization for Women ("NOW") sues on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and other women who use or may use the services of such centers.

Paragraph twenty-two,[9] though lengthy, provides no additional support for the plaintiffs' position. The paragraph appears under a "Class Allegations" subdivision of the complaint and tracks the requirements of organizational standing. *See infra* at 31. Indeed, the paragraph states that NOW wishes to represent the class in order to obtain declaratory and injunctive relief. That form of equitable relief was only requested under the Sherman Act count of the Second Amended Complaint.

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[9] Paragraph twenty-two provides:

> Plaintiff NOW brings this action on behalf of itself, its women members who use or may use the services of women's health centers that perform abortions, and all other women who use or may use the services of such health centers. NOW's women members who use or may use the services of women's health centers that perform abortions have standing in their own right, the interest NOW seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual NOW members in the lawsuit. Furthermore, there is a close relationship between the interests of NOW and the interests of other women who are not NOW members who use or may use the services of women's health centers that perform abortions, and the ability of such women to represent themselves is limited. Finally, in the case of both the class of NOW's women members who use or may use the services of women's health centers that perform abortions and the class of women who are not NOW members but who use or may use the services of such health centers, the class is so numerous that joinder of all of its members is impracticable; there are numerous questions of law and fact common to the class; NOW will fairly and adequately protect the interests of the class; and the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Paragraph 105[10] is part of count II which alleges violations of RICO section 1962(a). The section 1962(a) count of the Second Amended Complaint was not reinstated by the Seventh Circuit or the Supreme Court. Count II states that it is brought "by plaintiffs DWHO and Summit and the class they represent . . ." (Second Am. Compl. § 94). However, paragraph 105 does plainly state that "the RICO Defendants' activities have injured the plaintiff class of female NOW members . . ." Paragraph 110[11] is part of count III, alleged under RICO section 1962(c), and incorporates the injuries in paragraph 105. Count III was also stated to have been brought by "plaintiffs DWHO and Summit and the class of clinics they represent . . ." (Second Am. Compl. § 106). Although the section 1962(a) claims in count II were not reinstated, count III (the section 1962(c) claim) was reinstated. By asserting that NOW and its members have been

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[10] Paragraph 105 states:

> Specifically, the RICO Defendants' activities have decreased the business of, and/or increased the cost of doing business at DWHO, Summit, and similarly-situated clinics. The RICO Defendants' activities have injured the plaintiff class of female NOW members and other women who have been unable to obtain abortion services, or whose choice of clinics that provide these services has been restricted, by depriving them of the rights to choose freely between abortion providers in an unthreatened marketplace and to reap the economic and medical advantages of having that choice.
>
> WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action; award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

[11] Paragraph 110 provides:

> As a result of each defendant's violation of 18 U.S.C. Section 1968(c) [sic], plaintiffs have suffered the injuries described *supra* in paragraphs 104-105. WHEREFORE, plaintiffs ask that this Court certify this case as a plaintiffs' class action, award plaintiffs DWHO and Summit treble damages, to be proved at trial, along with costs, attorneys' fees, and grant all other relief to which plaintiffs may be entitled.

injured by violation of section 1962(c), NOW asserted status as a RICO plaintiff. Although not specifically stating that it brought RICO claims in paragraphs 106 and 111, NOW did plead specific facts and injury sufficient to state a claim for relief under both sections 1962(c) and (d) because it alleged the conduct that violated the statute and that NOW was injured by that conduct. *See Luckett v. Rent-A- Center, Inc.*, 53 F.3d 871 (7th Cir. 1995); *La Porte County Republican Central Comm. et. al. v. Bd. of Comm'rs of County of La Porte*, 43 F.3d 1126 (7th Cir. 1994); *Mid America Title Co. v. Kirk*, 991 F.2d 417, 422 (7th Cir. 1993); *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992).

NOW did all that is required to state a claim under RICO section 1962(c) and (d) in the Second Amended Complaint; it stated that it had been injured because of the defendants' actions that violated RICO.[12] Therefore, NOW is not barred from making RICO allegations in the Third Amended Complaint because it made the same allegations, albeit less elaborately and eloquently, in the Second Amended Complaint. This interpretation gives a reasonable interpretation to both the allegations contained in paragraph 94 and 106 (which are alleged by DWHO and Summit) as well as paragraphs 105 and 110 (which include NOW as an injured party, and therefore as a party making a claim under the count). *See* Restatement (Second) Contracts § 203(a) (year) ("an interpretation which gives a reasonable, lawful, and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."). NOW was a RICO plaintiff in the Second Amended Complaint, and it will be allowed to continue in that vein in the Third Amended Complaint.

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[12] The Supreme Court's statement in *dicta* that "only DWHO and SWHO [Summit], and not NOW, have sued under RICO," *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 802, is not to the contrary.

2. Wojnar's Res Judicata Argument Against All Plaintiffs

Defendant Conrad Wojnar argues that res judicata operates to bar all Plaintiffs from bringing RICO claims against him. Wojnar claims that in the Second Amended Complaint he was charged only with violations of the Sherman Act antitrust count (count I) and under pendent state law. Because the dismissal of the Sherman Act claims was left undisturbed, Wojnar concludes that res judicata bars the prosecution of the Third Amended Complaint's RICO allegations, as to him.

Plaintiffs argue that because the preclusive effect of res judicata is only available where a final judgment has been entered, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S. Ct. 645, 649 n. 5, 58 L. Ed. 2d 552 (1979), the doctrine is not available to *Wojnar* because the dismissal was reversed. Furthermore, the Plaintiffs argue that because the *Wojnar* was a defendant as to a state law claim under the Second Amended Complaint, *Wojnar* has not suffered a final dismissal and therefore no final judgment has been issued against him.

The court will analyze Wojnar's res judicata argument using the standard set forth above of identity of parties, identity of causes of action, and finality of judgment. *Car Carriers*, 789 F.2d at 595 n. 9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982).

a. Identity of the Parties

The first prong in the analysis of whether res judicata applies is whether the parties in the first and second actions are identical. *Car Carriers*, 789 F.2d at 595 n. 9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). The identity of the parties is not in dispute; the parties are identical for the purposes of this motion.

b. Identity of Causes of Action

The second prong of the analysis is whether the causes of action in the first and second actions are identical, under the

"same transaction" test as defined by the Seventh Circuit. *Car Carriers*, 789 F.2d at 595 n. 9; *Alexander*, 773 F.2d at 854; *Lee v. City of Peoria*, 685 F.2d 196, 199 (7th Cir. 1982). If the causes of action arise out of the "same transaction," the suits are identical for purposes of res judicata. *Id.* There is no serious contention that the claims against *Wojnar* in the Second Amended Complaint and those in the Third Amended Complaint do not arise from the same set of operative facts.

c. Final Judgment on the Merits

The third requirement for application of res judicata is that there have been a final judgment on the merits. It would appear that this requirement has been met, but Plaintiffs suggest otherwise. In count I of the Second Amended Complaint, Plaintiffs claimed that Wojnar violated the Sherman Act. The same conduct asserted to have violated the Sherman Act is now claimed to violate RICO. The Sherman Act count of the Second Amended Complaint was dismissed by the district court. *NOW v. Scheidler*, 765 F. Supp. at 937. That dismissal was affirmed by the Court of Appeals. *NOW v. Scheidler*, 968 F.2d at 612. It is not clear whether Plaintiffs included the dismissal of the Sherman Act count in their petition for certiorari to the Supreme Court, but it *is* clear that the Supreme Court did not grant certiorari on that issue. Thus, after the Supreme Court's decision in this case, the Court of Appeals reminded us that the Sherman Act claims were dismissed. *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2. Thus, it would seem, there has been a final judgment for res judicata purposes. Alas, nothing in this case is that simple.

Included in the Second Amended Complaint was also count V against Wojnar alleging "tortious interference with prospective economic advantage" under state law.[13] It was alleged that the district court had supplemental jurisdiction over

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[13] Wojnar was named as a defendant in only counts I and V of the Second Amended Complaint.

that and other state law counts. After the remand from the Supreme Court, the Court of Appeals stated that "counts five, six, seven, which allege violations of state law, survive as well pursuant to the district court's supplemental jurisdiction. See 28 U.S.C. § 1367." *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2. Plaintiffs seize upon that language to argue that if the state law claims survive and this court retains jurisdiction over them, then there could not have been a final judgment on the merits for res judicata purposes. There are several things wrong with Plaintiff's position: First, the quoted statement by the Court of Appeals is *dicta*; second, once the order of dismissal of Count I became final, this court ceased to have jurisdiction over count V of the Second Amended Complaint; and third, Plaintiffs misconstrue the operation of res judicata in this circumstance. Count I of the Second Amended Complaint stated a claim as to which this court had federal question jurisdiction. Count V stated a claim as to which this court had supplemental jurisdiction because of its relationship to the issues raised in count I; what was previously called "pendent claim" jurisdiction. *Finley v. United States*, 490 U.S. 545, 548, 109 S. Ct. 2003, 2006, 104 L. Ed. 2d 593 (1989) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); *Hurn v. Oursler*, 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933); *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 29 S. Ct. 451, 53 L. Ed. 753 (1909)). Count I was dismissed because the district court concluded that the Sherman Act was not applicable to the conduct alleged in the Second Amended Complaint. Res judicata should bar the Plaintiffs from now amending the complaint to allege a new (RICO) theory in connection with the same alleged conduct without regard to whether there remain unresolved state law claims. A brief example demonstrates why this is so. If the allegations against Wojnar contained in count V had been made in a separate state complaint rather than in the same (federal) complaint as count V, and the federal claim had been dismissed, there is no logical reason why res judicata should not bar Plaintiffs from filing a new federal complaint asserting a

different (federal) legal theory as to Wojnar, but based upon the same operative facts. In the example, the existence of the state claim is irrelevant to the question of whether res judicata should apply to the federal claim.

Plaintiffs claims against Wojnar are barred by res judicata and will be dismissed.

II. Supplemental, Ancillary, or Pendent Jurisdiction Over Vital-Med

Vital-Med alleges that its motion to dismiss should be granted because although there was a basis for federal jurisdiction under the Second Amended Complaint, there is no such basis under the Third Amended Complaint. In the Second Amended Complaint, Vital-Med was a defendant under count I (Sherman Anti-Trust Act) and count VII (breach of a duty of confidentiality allegedly owed to DWHO and Summit). Count I was dismissed by the district court, affirmed by the Court of Appeals, and not considered by the Supreme Court. The Third Amended Complaint names Vital-Med as a defendant only in count V alleging a breach of a duty of confidentiality owed to DWHO and Summit. Vital-Med contends this court should dismiss count V of the Third Amended complaint because there is no federal question or diversity jurisdiction, and the court has no basis for exercising supplemental, pendent, or ancillary jurisdiction pursuant to 28 U.S.C. § 1367(a) ("Section 1367").

Plaintiffs contend that this court has supplemental jurisdiction over Vital-Med because federal jurisdiction was never lacking, and therefore the pendent state law claim under which Vital-Med is sued in the Third Amended Complaint is proper pursuant to 28 U.S.C. § 1367. Vital-Med contends that section 1367 does not apply to this case because it was commenced before the statute's effective date.

As the only claim against Vital-Med is stated under state law, it is clear that claim is not supplemental to any federal claim. *Cf.* 28 U.S.C. § 1367(a).

A. Applicability of 28 U.S.C. § 1367

By its own terms, section 1367 provides for supplemental jurisdiction in the federal courts "[and] *shall apply to civil actions commenced on or after* the date of the enactment of this Act. [Dec. 1, 1990]." 28 U.S.C. § 1367 note (1990) (emphasis added). Section 1367 provides that once a district court has original jurisdiction over one claim in any civil action, that same court may adjudicate "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367.

This case was originally filed on October 17, 1986. An amended complaint was filed on February 3, 1989. [Docket number 155]. The Second Amended Complaint was filed on September 25, 1989. [Docket number 236]. Vital-Med was first named as a defendant in the Second Amended Complaint, in 1989. Vital-Med contends that, for section 1367 purposes, the case against them was filed in either 1986 or 1989, and therefore the statute does not apply to them. Thus, Vital-Med maintains that the court should look to pre-1990 law to determine whether it has jurisdiction over it and count V.

The Plaintiffs disagree, relying upon the opinion of the Court of Appeals that "[c]ounts five, six, and seven, which allege violations of state law, survive . . . pursuant to the district court's supplemental jurisdiction. *See* 28 U.S.C. § 1367." *NOW v. Scheidler*, No. 91-2468, 25 F.3d 1053, 1994 WL 196761 (7th Cir. May 16, 1994). Plaintiffs argue that because the Court of Appeals relied on section 1367, at least in part, in reinstating the state law count against Vital-Med, that this court should allow the claim to survive.[14]

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[14] The law of the case might come into play here, as the Seventh Circuit relied, with the intermediary signal "*see*" on section 1367. *See United States v. Mazak*, 789 F.2d 580, 581 (7th Cir. 1986); *United States v. South*, 28 F.3d 619, 629 (7th Cir. 1994); *Williams v. Commissioner of Internal Revenue*, 1 F.3d 502, 503 (7th Cir. 1993). However, this court need not follow the letter

This case has been in existence since 1986, and Vital-Med has been a defendant since 1989. No matter which date is the date on which the action was "commenced" for purposes of section 1367, both are before December 1, 1990, which is the date after which, by its own terms, section 1367 "*shall apply to civil actions commenced* [thereafter]." Therefore, section 1367 does not apply, and the court must look to the law of supplemental jurisdiction as it existed before section 1367 was enacted.

B. History of Supplemental Jurisdiction

In contrast to state courts, federal courts are forums of limited jurisdiction, possessing only the power to hear those cases enumerated in Article III of the United States Constitution and only to the extent authorized by Congress. U.S. Const. Art. III § 2; Friedenthal, *et al.*, Civil Procedure 64 (1992). It is fundamental that "as regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, . . . [t]he Constitution must have given to the court the capacity to take it, *and an act of Congress must have supplied it* . . . [t]o the extent that such action is not taken, the power lies dormant." *Finley v. United States*, 490 U.S. 545, 547, 109 S. Ct. 2003, 2006, 104 L. Ed. 2d 593 (1989) (quoting *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252, 18 L. Ed. 851 (1868)). Originally, this meant that federal courts could not exercise jurisdiction over non-federal claims or issues that were closely related to federal claims. However, federal judges managed to accommodate the need to exercise jurisdiction over non-federal claims, and two forms of federal jurisdiction developed, ancillary and pendent jurisdiction. Friedenthal, *et al.*, Civil Procedure 64 (1992).

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of the Seventh Circuit's ruling and assume, without analysis, that section 1367 applies because of the "*see*" signal. *A Uniform System of Citation* 23 (15th ed. 1991). The Court of Appeals was not relying directly on section 1367, rather, it was directing the reader's attention to the statute to show the general legal theory supporting its conclusion that the counts were to be reinstated. *See id.*

Originally, ancillary jurisdiction was used to allow federal courts to adjudicate claims to property where the ownership of that property was otherwise properly being litigated in federal court. *Freeman v. Howe*, 65 U.S. (24 How.) 450, 16 L. Ed. 749 (1860); 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3523 (1984). Before 28 U.S.C. § 1367 was enacted, the Federal Rules of Civil Procedure used a "transaction and occurrence" standard for compulsory counterclaims and cross-claims, thereby allowing ancillary jurisdiction over these claims. 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3523 (1984).

Pendent jurisdiction was developed by the Supreme Court in *Osborn v. Bank of United States*, 22 U.S. (9 Wheat.) 738, 6 L. Ed. 204 (1824), when Justice Marshall declared that a federal court of original jurisdiction should have the power to decide all the questions that a case presented and the court needed to decide in order to function effectively. *Osborn*, 22 U.S. (9 Wheat.) at 823. As the doctrine matured, pendent jurisdiction was most commonly exercised when a plaintiff brought a federal question claim and sought to have a related state law claim against the same defendant adjudicated before the federal court. *See, e.g., Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S. Ct. 468, 3 L. Ed. 2d 368 (1959) (Jones Act claim provides pendent jurisdiction for maritime claim that, by itself, could only be asserted on the admiralty side of federal court.). This was called "pendent claim" jurisdiction.

"Pendent party" jurisdiction was "jurisdiction over parties not named in any claim that is independently cognizable by the federal court." *Finley v. United States*, 490 U.S. 545, 550-51, 109 S. Ct. 2003, 2007-08, 104 L. Ed. 2d 593 (1989). *Finley* expressly stated that where federal courts were asked to assert pendent party jurisdiction, "as opposed to the addition of only claims, we will not assume that the full congressional power has been congressionally authorized, and will not read jurisdictional statutes broadly." *Finley*, 490 U.S. at 549, 109 S. Ct. at 2007. Thus, pendent party jurisdiction is generally not available

unless the statute expressly authorizes it. *See id.* "Pendent claim" jurisdiction, by contrast, exists whenever there is a claim 'arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .' U.S. Const. Art. III. § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966); *see also Finley*, 490 U.S. at 563-64, 109 S. Ct. at 2015 (Stevens, J., dissenting).

1. Application to Vital-Med

Plaintiffs contend that the issue before the court is whether Count V against Vital-Med is a proper pendent *claim*, while Vital-Med argues that the issue is whether the court has pendent *party* jurisdiction.

It is clear from the description of the various types of supplemental jurisdiction that existed prior to the enactment of section 1367 that any jurisdiction over plaintiffs' claim against Vital-Med depends upon an assertion of pendent *party* jurisdiction. *Finley v. United States*, 490 U.S. at 550-51, 109 S. Ct. at 2007-08; *Aldinger v. Howard*, 427 U.S. 1, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976) (plaintiff was unable to bring state law claims against a completely new party although the claims arose out of the same transaction and occurrence which gave rise to the plaintiff's federal claims). Vital-Med is not a defendant under any of the federal counts in the Third Amended Complaint. Plaintiffs have not asserted that Vital-Med is diverse from the plaintiffs.

Therefore, the court will grant Vital-Med's motion to dismiss count V of the Third Amended Complaint and Vital-Med as a defendant for lack of jurisdiction.[15] *Finley v. United States*, 490 U.S. at 550-51, 109 S. Ct. at 2007- 08; *Aldinger v.*

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[15] Vital-Med's argument regarding the inapplicability of the doctor-patient privilege to their relationship with the plaintiff clinics is therefore moot.

Howard, 427 U.S. 1, 96 S. Ct. 2413, 49 L. Ed. 2d 276 (1976); *see also Kreuzfeld A.G. v. Carnehammar*, 138 F.R.D. 594, 608-09 (S.D. Fla. 1991) (following *Finley* and dismissing a non-diverse, non- federal claim defendant in a case brought before section 1367 was enacted).

2. Application to Wojnar

As stated above, any attempt to assert a new (RICO) claim against Wojnar is barred by res judicata. Therefore all that is left are the state law claims against him. These claims can only be pendent party claims and the reasoning applicable to Vital-Med are equally applicable to Wojnar. *Finley v. United States*, 490 U.S. at 550-51, 109 S. Ct. at 2007-08; *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). The state law claims against Wojnar will also be dismissed. *Id.* The court now turns to the merits of the motions to dismiss for failure to state a claim.

III. Failure to State A Claim

The Defendants allege various theories why the Third Amended Complaint fails to state a claim upon which relief may be granted. Defendants argue that the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure should be granted if the complaint does not state a cause of action upon which relief may be granted. *Corcoran v. Chicago Park Dist.*, 875 F.2d 609, 611 (7th Cir. 1989). The facts as alleged below are viewed in the light most favorable to the Plaintiffs for the purpose of determining the Defendants' motions to dismiss. *Dimmig v. Wahl*, 983 F.2d 86, 87 (7th Cir. 1993). Unless it appears beyond doubt that Plaintiffs can prove no facts which would entitle them to relief, the Court must deny the motion. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L. Ed. 2d 80 (1957); *Mid America Title Co. v. Kirk*, 991 F.2d 417, 419 (7th Cir.), *cert. denied*, 510 U.S. 932, 114 S. Ct. 346, 126 L. Ed. 2d 310 (1993). However, the court need not strain to find inferences favorable to Plaintiffs which are not

apparent on the face of the complaint. *Coates v. Illinois St. Bd. of Educ.*, 559 F.2d 445, 447 (7th Cir. 1977). Similarly, the court is not required to accept legal conclusions either alleged or inferred from pleaded facts. *Nelson v. Monroe Regional Medical Ctr.*, 925 F.2d 1555, 1559 (7th Cir. 1991).

The factual allegations of this case will be outlined generally. Plaintiff NOW is a nationwide, non-profit organization dedicated to "advancing and protecting the legal rights of women." (Complaint § 7). DWHO is a Florida corporation with its principal place of business in Delaware. (Complaint § 8). Summit is a partnership with its principal place of business in Delaware. (Complaint § 9). Plaintiffs allege that all the defendants except Vital-Med[16] are involved in an "enterprise," as defined in 18 U.S.C. § 1961(4). This enterprise, called the Pro-Life Action Network ("PLAN") engages in or affects interstate commerce. According to the complaint, PLAN's common purpose is to use racketeering activity to drive out of business all clinics that provide abortion services. PLAN's activities are distinct from the pattern of racketeering activity engaged in by each defendant.

Defendants Scheidler, Terry, Scholberg, Murphy, Migliorino, Wojnar[17] and the Pro-Life Action League ("PLAL") are each persons under 18 U.S.C. § 1961(3), and are associated with PLAN by virtue of their involvement with its annual conventions as speakers and in other leadership capacities. No later than 1987, Scheidler and Terry sat on PLAN's leadership council. (Complaint §§ 11-12). Migliorino has been a featured speaker at one or more PLAN conventions. (Complaint § 16). Scheidler, Scholberg, Wojnar, Murphy, PLAL, and Vital-Med are residents of Illinois. (Complaint §§ 11, 13, 14, 15, 17, 18). Migliorino is a Wisconsin resident. (Complaint § 16). Terry

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[16] Vital-Med will be dismissed from this case pursuant to this memorandum opinion.

[17] Wojnar will be dismissed from this case pursuant to this memorandum opinion.

and Project Life are New York residents. (Complaint §§ 12, 20). Defendants PLAL, Operation Rescue ("OR") and Project Life are each persons under the RICO statute, are associated with PLAN, and participate in PLAN by being its member groups. Since 1984, Vital-Med or its predecessor has provided pathology testing and other services to DWHO, Summit, and their affiliated clinics. (Complaint § 17).

PLAL's business consists of using racketeering activity to disrupt clinics that perform abortions. (Complaint § 18). Scheidler has been the director of PLAL. (Complaint § 11). Scholberg was the assistant director of PLAL from February, 1988 until approximately 1990. (Complaint § 13). Murphy has been a paid employee of PLAL since September, 1988, and he worked as a volunteer for PLAL before that date. (Complaint § 15). Terry has been the executive director of Project Life and was the national organizer of Operation Rescue. (Complaint § 12).

OR's business consists of using racketeering activity to disrupt and close clinics that perform abortions. OR has, through Terry and other agents and co-conspirators, engaged in racketeering activity within this district. (Complaint § 19).

Project Life has engaged in racketeering activity in this district through PLAN, Terry, and other agents and co-conspirators. (Complaint § 20).

Plaintiffs allege that the Defendants committed the following predicate acts of racketeering, including acts and/or threats of: (1) extortion against clinic personnel, patients, and suppliers of goods; (2) murder of clinic personnel, including doctors and their families; (3) kidnaping of clinic personnel, including doctors and their families; and (4) arson of clinics that provide abortion services; (4) [sic] taking possession of interstate shipments of fetal remains with intent to convert the remains to their own uses; (5) obstruction of interstate commerce by extortion and/or threats to commit extortion and/or the commission or threat of physical violence to persons

and property; and (6) travel in interstate commerce and the use of facilities in interstate commerce with intent to commit crimes of violence to further acts of extortion and/or arson, and/or to promote, manage, establish, or facilitate the promotion, management, establishment of extortion or arson. (Complaint § 2).

A. Proximate Cause and Standing

1. Standing

a. DWHO and Summit

The Terry Defendants allege that DWHO and Summit lack the necessary "proximate causation" and standing to bring both 18 U.S.C. § 1962(c) ("substantive RICO") and (d) ("RICO conspiracy") charges against them.

The plaintiff clinics argue that in addition to defendants' conduct at the plaintiff clinics the Defendants' "threats and acts of nationwide violence" satisfy the requirements of standing and proximate cause for the substantive RICO and RICO conspiracy claims. Defendants maintain that Plaintiffs' allegations regarding "illegal anti-abortion activities elsewhere [at clinics other than DWHO and Summit]" are insufficient to show proximate cause.

RICO's standing provision for civil cases, 18 U.S.C. § 1964(c), provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Thus, to have standing to assert claims for either substantive RICO or RICO conspiracy violations, a plaintiff must be injured in her "business or property" due to the violation.

The seminal case on RICO standing and proximate causation is *Holmes v. S.I.P.C.* There, the Supreme Court

concluded that under § 1964(c), the plaintiff need not be *directly* injured by the defendants. Rather, common law principles of proximate cause apply. *Holmes v. S.I.P.C.*, 503 U.S. 258, 268-70, 112 S. Ct. 1311, 1318, 117 L. Ed. 2d 532 (1992). The requirement that there be proximate cause bars a plaintiff from recovering where her injury flowed "merely from the misfortunes visited upon a third person by the defendant's acts." *Id.* (citing 1 J. Sutherland, *Law of Damages* 55-58 (1882)). In *Holmes*, the Supreme Court concluded that plaintiff Securities Investor Protector Corporation ("SIPC") did not have standing to sue a broker-dealer under RICO despite SIPC's claim that it had the subrogated rights of the broker-dealer's customers because the link between the alleged stock manipulation which caused the injury and losses to the nonpurchasing customers was too contingent on the broker-dealer's inability to pay the claims and was therefore too remote to be the proximate cause of the customers' injuries.

However, in this case, the Supreme Court has already noted that the Second Amended Complaint made sufficient allegations to confer standing. *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 803. The plaintiff clinics alleged in the Second Amended Complaint that (1) the defendants conspired to use force to induce clinics staff and patients to stop working and obtaining services elsewhere; and (2) that the conspiracy injured the business and/or property interests of the plaintiffs. *Id.* The Court stated that in light of the limited requirement that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific allegations that are necessary to support the claim," *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137, 119 L. Ed. 2d 351 (1992).), "nothing more is needed to confer standing . . . at the pleading stage." *Id.*

The following allegations are set forth as examples that show injury to the Plaintiffs and that have been connected to each of the specific defendants:

1. Attempted and actual extortion committed by Scheidler on April 11, 1986 when he threatened DWHO's clinic administrator with "reprisals" if she refused to quit her job at the clinic. (Complaint § G). [This allegedly harmed DWHO because it caused the clinic to lose personnel and be forced to retrain a new administrator. It allegedly harmed NOW's members because it hampered their ability to transact business with the clinic, and may have increased the cost of obtaining DWHO's services.]

2. Attempts, conspiracies to commit and the commission of extortion and/or physical violence by Operation Rescue when it organized a "National Day of Rescue" on October 29, 1988, and blocked access to clinics in forty cities and attempted to force the clinics to close. (Complaint § I(4)). [This allegedly harmed the plaintiffs because, reading the complaint in the light most favorable to the plaintiffs, the activities surrounding the National Day of Rescue was committed against both Summit and DWHO. This, in turn, caused the plaintiff clinics to lose business that day, and NOW's members to be unable to transact business with the target clinics on that day.]

3. Attempts, conspiracies to commit and the commission of extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL and "others" against DWHO and Summit by conspiring to steal, stealing, and hiding interstate shipments of fetal specimens. (Complaint § J(1)). [This harmed both DWHO and Summit by interfering with their business relations with Vital-Med.]

4. Scheidler, Murphy, PLAL, and "others" threatened to disclose private information about the patients of the plaintiff clinics in connection with the theft of the fetal remains. This was done in order to interfere with the actual or prospective business relations with the plaintiff clinics. (Complaint § J(2)). [The clinics argue that Defendants' actions harmed their business relationship with potential and current patients because the patients' confidential medical information could be revealed by Defendants.]

5. Attempts and conspiracies to commit extortion by Scheidler, Murphy, Migliorino, Wojnar, PLAL, and "others" against doctors working with "clinics affiliated with DWHO and Summit" by disclosing the names of the doctors who worked at the clinics. Defendants disclosed those names to induce fear in the doctors and force them (and the clinics who employed them) to forego the economic benefits of their business relations. (Complaint §§ 87(K)-87(L)). [The clinics argue that this disclosure harmed the clinics business, and NOW's ability to transact business with the clinics and the doctors practicing at those clinics.]

6. Migliorino forced Summit's new lessor to breach its lease with the clinic by threatening to disrupt and harass the other tenants if Summit were allowed to move into the building. (Complaint §§ 80-81). [This harmed Summit by having to incur the expense of finding a new location and, Plaintiffs allege, increased rental costs.]

7. Migliorino, Murphy, Wojnar, and Scheidler have used the telephone and mail to intimidate and harass clinics in at least six states. (Complaint § 35). [Causing harm to the target clinics (DWHO and Summit are not alleged to be targets of this activity) by violating the Hobbs Act and causing intimidation and harassment as well as increasing staff turnover, and increasing costs by requiring higher salaries to keep staff at the plaintiff clinics].

8. Terry was the executive director of Project Life and was the national organizer of Operation Rescue. Terry also served on the leadership council of PLAN and conspired with others in PLAN to close clinics through force and violence. (Complaint § 12). Operation Rescue and Project Life, in turn, executed over on hundred violent blockades of clinics that performed abortions. Terry participated in these blockades. (See Complaint §§ 60- 66). [This harmed the target clinics by interfering with their business relationships with patients and employees. Plaintiffs also argue that the blockades force the target clinics to give up property rights. None of these

blockades were alleged to have occurred at the plaintiff clinics' premises. However, the conspiracy to close clinics through violence could arguably affected the plaintiffs because they are clinics that perform abortions and are therefore in the class of clinics targeted by PLAN.]

9. Scholberg conspired with others at PLAN conferences and "mini-conferences" to close clinics through force and violence and participated in several violent clinic blockades (at several of which Scholberg was arrested), although none of the blockades were at either of the plaintiff clinics. (Complaint §§ 53, 55, 58). [Plaintiffs allegedly were injured by Scholberg's participation in the planning and conspiring to close clinics through force and violence.]

Thus, the allegations under the Third Amended Complaint alleges sufficient facts to satisfy general standing requirements, which is all that is required at the pleading stage. *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 803; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S. Ct. 2130, 2136 (1992); *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197, 2206- 07, 45 L. Ed. 2d 343 (1975).

b. NOW

NOW presents a special standing problem. The Scheidler Defendants allege that NOW lacks organizational standing to bring the claims under the Third Amended Complaint. Generally, an injured party must assert her own legal rights and interests and cannot rest her claim to relief on the legal rights or interests of third parties. *Warth v. Seldin*, 422 U.S. at 499, 95 S. Ct. at 2205; *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 600 (7th Cir. 1993). However, in certain circumstances, an association may have standing solely as the representative of its members. *Warth v. Seldin*, 422 U.S. at 511, 95 S. Ct. at 2211; *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d at 600; *Southwest Suburban Bd. of Realtors v. Beverly Area Planning Ass'n*, 830 F.2d 1374, 1380 n. 3 (7th Cir. 1987) (citing cases). The landmark case for associational, or

organizational, standing is *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). The *Hunt* test is as follows:

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt, 432 U.S. at 343, 97 S. Ct. at 2441. Nonetheless, the possibility of representational standing does not "eliminate or attenuate the constitutional requirement of a case or controversy." *Warth v. Seldin*, 422 U.S. at 511, 95 S. Ct. at 2211; *see Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). The *Hunt* test was recently reaffirmed in *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 106 S. Ct. 2523, 91 L. Ed. 2d 228 (1986), where the Court specifically noted that very often an organization will present an especially efficient vehicle for litigation from the perspective of both the litigants and the judicial system. *Brock*, 477 U.S. at 289, 106 S. Ct. at 2532. The Court continued, "[a] preexisting organization can often draw upon a preexisting reservoir of experience, research, and capital. These resources . . . can often sharpen the presentation of issues appreciably – one of the primary concerns of the doctrine of standing." *Retired Chicago Police Ass'n*, 7 F.3d at 600 (citing *Brock*); *see Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 187, 71 S. Ct. 624, 656, 95 L. Ed. 817 (1951) (Jackson, J., concurring).

The first prong of the *Hunt* test is the ability of the members of the association to sue in their own right for the alleged injury. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441; *see Brock*, 477 U.S. at 282, 106 S. Ct. at 2529. The Scheidler Defendants maintain, without citing authority, that NOW does not meet the first prong of this test because "only those NOW members injured in their 'business or property' would have standing to sue under RICO."

Plaintiffs argue, however, that "the [Third Amended] Complaint has alleged direct inference with NOW members' business and property rights sufficient to meet the first *Hunt* element. *See* §§ 4, 5; *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 351 (7th Cir. 1992)". (Response p. 20 n. 6).

This court has been given some guidance from the Supreme Court in its opinion reversing the dismissal of this case. *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 803. The Court emphasized that "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137, 119 L. Ed. 2d 351 (1992). The Court concluded that DWHO and Summit had claimed sufficient injury to their business and/or property interests to confer standing on both of the clinics. *Id.* However, alleging injury is not enough; RICO requires the complaining party to have been "injured [in her] business and/or property interests" in order to establish standing. 18 U.S.C. § 1964(c). Mindful of Congress' broad remedial purposes in enacting RICO, courts have interpreted the phrase "business or property" to mean only commercial interests, as distinct from personal interests such as pain and emotional suffering. *See, e.g., Doe v. Roe*, 958 F.2d 763 (7th Cir. 1992) (value of client's sexual activity, allegedly performed for attorney to pay legal fees incurred in divorce proceeding was not "business or property" for purposes of RICO); *Rylewicz v. Beaton Svcs.*, 888 F.2d 1175, 1180 (7th Cir. 1989) (the terms "business or property" are words of limitation which preclude recovery for personal injuries and the pecuniary losses incurred therefrom); *Oscar v. University Students Co-op. Ass'n*, 965 F.2d 783 (9th Cir. 1992) (personal injuries, such as diminution of enjoyment of apartment suffered by tenant as result of alleged drug racketeering in neighboring apartment, not compensable under RICO); *Van Schaick v. Church of Scientology of Cal. Inc.*, 535 F. Supp. 1125, 1137 (D.Mass.1982); *Savastano v. Thompson Medical Co.*, 640 F. Supp. 1081, 1087 (S.D.N.Y.1986).

The Supreme Court has focused this court's interpretation of the "business or property" language. The Court found standing under the Second Amended Complaint because of allegations that the Defendants "conspired to use force to induce clinic staff and patients to stop working and obtain medical services elsewhere." *NOW v. Scheidler*, 510 U.S. at ---, 114 S. Ct. at 803.

The Third Amended Complaint alleges that NOW's members have been harmed by the Defendants' blockades, threats, and destruction because women members are unable to avail themselves of a commercial relationship; the ability to transact business with the clinics. This type of injury does indeed implicate the right to transact legal business. Moreover, this type of injury is clearly *not* the kind of injury for which courts have barred recovery under RICO – it is not a "personal" injury such as pain, suffering, or humiliation. Therefore, NOW's women members would have a right to sue in their own capacities. Thus, the first prong of the *Hunt* test is satisfied.

The second prong of the *Hunt* test is whether the interests that the organization seeks to protect or enforce are germane to the organization's purpose. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441; *see Brock*, 477 U.S. at 282, 106 S. Ct. at 2529. NOW's organizational purpose is "advancing and protecting the legal rights of women." The Defendants contend that because NOW's purpose is not abortion-specific, it may not maintain standing to prosecute this suit. Plaintiffs maintain, however, that NOW seeks to ensure reproductive freedom, which it contends is "unquestionably germane" to NOW's organizational purpose. Plaintiffs argue, moreover, that it is not necessary that the organization's sole purpose relate to the issue being litigated. Plaintiffs are correct. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441 (interests sought to be protected must be "germane to the organization's purpose"); *Brock*, 477 U.S. at 287, 106 S. Ct. at 2531 (same, *quoting Hunt*). Ensuring the right to abortions is a germane interest to NOW's purpose of protecting the legal rights of women. The fact that some do not share NOW's view

that ensuring access to abortion services advances and protects the legal rights of women does not diminish the existence of the right or the validity of NOW's interpretation of its goals. Since *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the Supreme Court has recognized a woman's right to have an abortion under certain circumstances without undue interference by the state. *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990). To the extent that the Third Amended Complaint alleges that that legal right is or has been hampered or threatened by Defendants, it conforms with NOW's purpose of protecting women's rights sufficiently to meet the second prong of the *Hunt* test.

The final prong of the *Hunt* test is whether the claim asserted or the relief requested requires the participation of individual members in the lawsuit. *Hunt*, 432 U.S. at 343, 97 S. Ct. at 2441; *see Brock*, 477 U.S. at 282, 106 S. Ct. at 2529. Defendants contend that NOW cannot satisfy this prong of the test because individual members will have to participate in the suit to prove the damages that they actually suffered. Plaintiffs argue that individual members will not have to participate in the suit because NOW does not seek damages under the Third Amended Complaint, rather, it seeks injunctive relief for its members. Therefore, NOW argues, there is no need for individual participation in the suit.

NOW sues only for injunctive relief. The only potential recipients of treble damages would be DWHO, Summit, and any possible class of clinics that they might represent. Thus, there would be no need for individual NOW members to establish pecuniary loss. NOW need only show, at the pleading stage, that some members would benefit from the injunctive relief requested. *Warth v. Seldin*, 422 U.S. at 515, 95 S. Ct. at 2213 ("the remedy, if granted, will inure to the benefit of those

members of the association actually injured"); *Brock*, 477 U.S. at 288, 106 S. Ct. at 2531-32; *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d at 601. It may be necessary for at least some of NOW's membership to testify as to their impediments in receiving treatment at abortion clinics; however, the limited nature of this proof will not force NOW to violate *Hunt's* third prong. NOW has standing to sue as an association.

2. Requirement of Predicate Act as Proximate Cause

Defendants contend that even if there is standing and general proximate cause, Plaintiffs should not be allowed to prosecute this case because their injuries do not arise out of predicate acts under RICO. Plaintiffs contend that the injuries need not arise out of predicate acts, as long as the injuries arise out of acts in furtherance of the conspiracy.

The RICO statute prohibits persons engaged in an interstate "enterprise" from conducting that enterprise's affairs through "a pattern of racketeering activity." 18 U.S.C. § 1962(c). "Racketeering activity" means either any act or threat of violation of several, enumerated felonious state crimes or any act which is punishable under several enumerated federal statutes. 18 U.S.C. § 1961(1). These enumerated activities are called "predicate acts." The "pattern" requirement is satisfied if the defendant commits at least two predicate acts within a ten year period (excluding any time spent in prison). 18 U.S.C. § 1961(5).

The circuits are split on the issue of whether a predicate act must be the proximate cause of the injury. The Seventh Circuit is in the group that does not require that the injury flow from a predicate act.[18] *Schiffels v. Kemper Financial Services, Inc.*,

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[18] *Cf.* Cases in which RICO standing was denied are generally those in which an employee-plaintiff did not allege a sufficient nexus between the alleged predicate acts committed by the employer and her termination. *See, e.g., Reddy v. Litton Industries, Inc.*, 912 F.2d 291 (9th Cir. 1990) (plaintiff who raised RICO charges in a wrongful discharge suit lacked standing under RICO because the plaintiff was the victim of an alleged wrongful discharge

978 F.2d 344 (7th Cir. 1992); *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169-70 (3d Cir. 1989) (injury from overt act that furthers RICO conspiracy is sufficient to confer standing, even if overt act is not a predicate act of racketeering); *see Reddy v. Litton Indus., Inc.*, 502 U.S. 921, 112 S. Ct. 332, 116 L. Ed. 2d 272 (1991) (White, J. dissenting from denial of certiorari) (noting split in the circuits). This Circuit adopted the *Shearin* approach in *Schiffels* and stated that there is no need to show the injury to the plaintiff arose out of a "predicate act" as long as it arose from an "overt act" in furtherance of a RICO conspiracy, thereby being injured "by reason of" the conspiracy. *Schiffels*, 978 F.2d at 349. Schiffels had RICO standing where she sued her employer under the theory that "the defendants [employer] conspired to violate § 1962(c) by conducting the affairs of an enterprise – the Kemper Plan – through a pattern of mail fraud. The defendants harassed and eventually fired her, she says, to further the conspiracy by keeping her from revealing the fraudulent scheme." *Schiffels*, 978 F.2d at 351. The Court noted that finding standing in this context would not open the floodgates to many potentially frivolous suits because the common law principle of proximate cause will still provide a limit on standing to sue under RICO. *Schiffels*, 978 F.2d at 350 (citing *Holmes*, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)).

In light of the foregoing, the plaintiffs have standing to sue for RICO conspiracy if they alleged that their injuries arose out

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and not of any predicate act under RICO); *Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151 (6th Cir. 1990) (plaintiff who alleged wrongful discharge after reporting the employer's scheme to ship defective products lacked standing to assert a RICO claim because the predicate acts of racketeering were not the cause of the alleged injury); *Flinders v. Datasec Corp.*, 742 F. Supp. 929 (E.D. Va. 1990) (plaintiff who was terminated after threatening to expose a kickback scheme lacked standing because his termination was not an injury caused by the racketeering acts). Obviously, these cases are distinguishable based on subject matter of the dispute. However, this court need not go through that analysis because the Seventh Circuit has adopted an alternative approach.

of one or more "overt acts" in furtherance of PLAN thereby being injured "by reason of" the conspiracy. *See Schiffels*, 978 F.2d at 349. It is also unnecessary to decide which of the alleged conduct would constitute predicate acts – all that is necessary is that the conduct was done in furtherance of the enterprise. *Id.*

Defendants have argued that the complaint fails to allege the existence of a RICO conspiracy under section 1962(d) with sufficient specificity. However, Fed. R. Civ. P. 8(a)(2) merely requires a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Each count of the complaint should contain such a statement. There are heightened pleading requirements for pleading fraud which are contained in Fed. R. Civ. P. 9, but they apply *only* to cases alleging fraud. "Rule 9(b) applies only to fraud or mistake, not to conspiracy. [A] pleading of conspiracy, apart from the underlying acts of fraud, is properly measured under the more liberal pleading requirements of Rule 8(a). Even so, the complaint must allege some factual basis for a finding of a conscious agreement among the defendants." *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 26 n. 4 (2d Cir. 1990); *see also Rose v. Bartle*, 871 F.2d 331, 366 (3d Cir. 1989); *Andreo v. Friedlander, Gaines, Cohen, Rosenthal & Rosenberg*, 660 F. Supp. 1362, 1372 (D.Conn.1987). The requirements for pleading a RICO conspiracy are measured by the liberal pleading requirements of Fed. R. Civ. P. 8(a). *Farberware v. Groben*, 1992 WL 80722 (S.D.N.Y.1992). It is inappropriate to dismiss a complaint without allowing the plaintiffs the opportunity to discover whether, in fact, their injuries resulted from the defendants actions. The court is uncomfortably aware that this is a nine-year old case, in which some discovery has been completed. However, a Third Amended Complaint is before the court today. The age of the case does not change the liberal pleading requirements of Rule 8. As discussed above, both DWHO and Summit have pled that the defendants have conspired at PLAN meetings to (violently) close clinics that provide abortion services, and deprive NOW's

women members the opportunity to avail themselves of those services. That is all that is required at this time to state a claim of a RICO conspiracy.

Finally, Defendants Terry, Operation Rescue, and Project Life all contend that no specific allegations of predicate acts are made against them and that therefore they should be dismissed from this case. This argument misconstrues the concept of *conspiracy*. Terry is alleged to be a conspirator in the PLAN enterprise, and thus, although there are no allegations that he committed any substantive acts against the plaintiffs in his own right, he may still be held liable for *conspiring* with the other defendants. That satisfies proximate cause for the § 1962(d) conspiracy. Operation Rescue is a member of PLAN and is alleged to have orchestrated the "National Day of Rescue" which affected the plaintiff clinics individually and to have made "class-wide threats of force and violence against all clinics [that provide abortion services]." Operation Rescue has therefore allegedly committed predicate acts against DWHO, Summit and NOW. The status of Project Life is more difficult. Project Life is alleged to have organized "massive blockades" and "clinic invasions" which were designed to block access to the clinics to prevent patients and staff from entering or leaving the facility and to create a threatening and intimidating atmosphere and a public image of danger at the clinics – thereby violating "substantive RICO" under § 1962(c). (Complaint § 59). This is alleged to violate the Hobbs Act, which is a predicate act under RICO. Project Life is alleged to have participated in many of PLAN's annual conferences.[19]

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[19] The word "participate" has given this court some difficulty. Although 18 U.S.C. § 1962(c) prohibits "conduct[ing] or particip[ation] directly or indirectly, in the conduct of [a RICO] enterprise's affairs," the term is, in the linguistic sense, broad. Webster's Third New International Dictionary 1646 (1976) ("participate" means "to take part in something, usually in common with others"). However, the Supreme Court recently interpreted the phrase and concluded that "participate" requires some "element of direction." *Reves v. Ernst & Young*, 507 U.S. 170, ---, 113 S. Ct. 1163, 1169-70, 122 L. Ed. 2d 525 (1993). The Supreme Court adopted the "operation and management"

Although this is not a predicate act per se, it does connect Project with PLAN and could give rise to conspiracy liability under § 1962(d). *United States v. Kragness*, 830 F.2d 842 (8th Cir. 1987) (RICO conspiracy law, like traditional conspiracy law, requires only that each defendant agree to join the conspiracy, not that he agree to commit each of the acts that would achieve the conspiracy's purpose.); *United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990) (Personal agreement to commit two predicate acts is not a prerequisite to RICO conspiracy liability); *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 567 F. Supp. 1146 (D.N.J.1983) (Congress specifically provided that a conspiracy to violate substantive RICO offenses is itself a violation intended to establish separate conspiracy offense distinct from substantive offenses.), *aff'd in part, rev'd in part,* 742 F.2d 786 (2d Cir. 1984) (Defendants must knowingly agree to further the affairs of the enterprise to be liable under RICO), *cert. denied,* 469 U.S. 1211, 105 S. Ct. 1179, 84 L. Ed. 2d 327 (1985). Thus, all three of the Terry Defendants have been adequately bound in this complaint under either a direct predicate act or a conspiracy theory of liability under section 1962(d).

B. Pleading Deficiencies

Defendants have alleged several pleading deficiencies in the Third Amended Complaint: (1) whether the violations of the Hobbs Act are well-pled; (2) whether a RICO conspiracy has

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test established by the Eighth Circuit in *Bennett v. Berg*, 710 F.2d 1361, 1364 (en banc), *cert denied sub nom. Prudential Ins. Co. of America v. Bennett*, 464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983). *Reves*, 507 U.S. at ---, 113 S. Ct. at 1169-70. It is unnecessary (and impossible) for this court to analyze now whether any of the defendants' conduct rises to the level of "operation and management" of PLAN. Plaintiffs have pled that the defendants "participated" in PLAN which this court will interpret as meaning "operate or managed" in light of *Reves*. Nothing more need be pled at this time to overcome these motions to dismiss. Nonetheless, plaintiffs are reminded that they will eventually have to prove facts which shows each of the remaining defendants did something more than attended PLAN meetings and/or endorsed its positions.

been pled under § 1962(d); (3) whether a violation of § 1962(c) has been pled.

1. Hobbs Act

On remand, the Seventh Circuit directed this court to address whether the Defendants' actions violated the Hobbs Act. *NOW v. Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2. The Defendants come at this question from two different angles. First, the Terry Defendants contend that there simply are insufficient facts alleged upon which this court could grant relief because the Complaint fails to allege that Defendants obtained property from the Plaintiffs. Second, the Scheidler Defendants state that the Plaintiffs' reading of the Hobbs Act is too broad based upon the basic language of the statute, and the acts alleged as violating the Act simply do not state a violation. Essentially, however, both sets of defendants make the same argument: that their actions did not violate the Hobbs Act. Plaintiffs argue that the Hobbs Act predicate acts are well-pled; that there is no need to allege that the property that they lost wound up in the Defendants' hands.

The Hobbs Act is violated by anyone who "in any way or degree obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires to so do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to violate [this section] . . ." 18 U.S.C. § 1951(a). Extortion is defined as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).

The elements of a Hobbs Act violation are: the defendants (1) induce their victims to part with property; (2) through the use of fear; (3) with an adverse effect on interstate commerce. *United States v. Local 560 of Int'l Brotherhood of Teamsters*, 780 F.2d 267, 281 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986); *see* Harold Brown, *Civil RICO Practice: Causes of Action* 314 (1991); Carole

Golinski, *In Protest of NOW v. Scheidler*, 46 Ala. L. Rev. 163, n.134 and accompanying text (1994).

The definition of "property" under the Hobbs Act is expansive. *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990). The Act "speaks in broad language, manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion . . ." *Stirone v. United States*, 361 U.S. 212, 215, 80 S. Ct. 270, 272, 4 L. Ed. 2d 252 (1960). "In a broad sense, [property includes] any valuable right considered as a source or element of wealth, including 'a right to solicit business.'" *Town of West Hartford*, 915 F.2d at 101 (quoting *United States v. Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir. 1969), *cert. denied*, 397 U.S. 1021, 90 S. Ct. 1258, 1262, 25 L. Ed. 2d 530 (1970), and citing *Northeast Women's Center*, 868 F.2d at 1350). The property affected may be either tangible or intangible, such as the right to conduct business. *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1350 (3d Cir. 1989) (citing *Local 560*, 780 F.2d 267, 281 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986), for the proposition that the Hobbs Act extends to protect intangible as well as tangible property). The right to pursue a lawful business has likewise been protected. *Louis K. Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S. Ct. 57, 73 L. Ed. 204 (1928); *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969).

Indeed, the Seventh Circuit noted earlier in this case that "[t]he Hobbs Act . . . does not require that the Defendant profit economically from the extortion." *NOW v. Scheidler*, 968 F.2d at 630 n. 17 (citing *Town of West Hartford*, 915 F.2d at 102; *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983) (defendant kidnaped and threatened to kill doctor unless he agreed to stop performing abortions violated Hobbs Act); *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975)).

Extortion under the Hobbs Act, thus, focuses on the loss to the victim. *United States v. Santoni*, 585 F.2d 667, 672 (4th Cir.

1978) ("the gravamen of the offense [of extortion under the Hobbs Act] is loss to the victim," quoting *United States v. Frazier*, 560 F.2d 884, 887 (8th Cir. 1977)). If Plaintiffs have alleged that they have sustained economic losses resulting from Defendants' actions, that is sufficient to withstand this motion to dismiss.[20] The plaintiff clinics allege that the Defendants deprived them of: (1) business between patients and themselves; and (2) a business relationship with doctors and other personnel who were induced to quit because of Defendants' actions. The right to provide abortion services has specifically been included in the "property" included in the Hobbs Act protection, *Northeast Women's Center*, 868 F.2d at 1350, as has a business' goodwill and customer revenues, *United States v. Zemek*, 634 F.2d 1159, 1173 (9th Cir. 1980). Plaintiffs also allege deprivation of certain tangible items which were damaged or lost in various blockades and "blitzes" of the clinics. Summit alleges it lost a business relationship with a potential landlord because of Migliorino's actions and interference. These allegations are sufficient to show that the Plaintiffs parted with property.

Similarly, the Scheidler Defendants' contention that the "rule of lenity" restrains this court from deciding that no economic profit is required under the Hobbs Act. The Hobbs Act violations are predicate acts in a *civil* RICO action. The rule of lenity only applies to criminal actions. *United States v. Hopson*, 18 F.3d 465, 469 (7th Cir. 1994) ("The rule of lenity dictates that when a statutory ambiguity cannot be resolved through standard methods of interpretation, the ambiguity should be resolved in favor of the criminal accused," citing *Chapman v. United States*, 500 U.S. 453, 462-64, 111 S. Ct. 1919, 1926, 114 L. Ed. 2d 524 (1991); *United States v. Bass*, 404 U.S. 336, 347-48, 92 S. Ct. 5'5, 522-23, 30 L. Ed. 2d 488

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[20] Plaintiffs' argument that the Defendants did "obtain" or seek to obtain the plaintiff clinics' patients, and the clinics' agreement not to perform abortions is therefore superfluous. The court need not reach this argument.

(1971)). Thus, the rule is of no aid to the defendants in this case.

The court now turns to the remaining requirements to allege Hobbs Act violations. *See Local 560 of Int'l Brotherhood of Teamsters*, 780 F.2d at 281. Plaintiffs allege, and the Defendants do not contest, that they parted with this property because they feared violence would occur if they did not. Moreover, Plaintiffs allege that the Defendants, through the PLAN enterprise and individually, threatened and committed forceful and violent acts against them and other similarly situated clinics. Third, Plaintiffs have alleged the Plaintiffs' businesses function in interstate commerce, because some patients do not reside in the state where the clinics are located. Thus, Congress' power, and therefore the Hobbs Act, reaches the Defendants' activities. The Hobbs Act predicate acts are well-pled.

United States v. Enmons, 410 U.S. 396, 406 n. 16, 93 S. Ct. 1007, 1013 n. 16, 35 L. Ed. 2d 379 (1973), cited by the Defendants, is not to the contrary. *Enmons* says that when labor unions strike for legitimate purposes, the Hobbs Act does not apply to those activities. The problem is, of course, that in labor strikes, the purpose is to cause or threaten economic harm to achieve the union's purposes. Similarly, here the aim was to cause economic harm to achieve the defendants' purposes. In labor law the use of this concerted activity to cause or threaten harm is specifically sanctioned by statute – here it is not. Moreover, the ultimate goal of these defendants is to interfere with the exercise of a constitutional right. This is so far removed from the circumstances of *Enmons* that any reliance upon that case by defendants is misplaced.

Finally, the Terry Defendants' contention that this well-accepted view of the Hobbs Act would encompass "virtually any unlawful activity designed to change anyone's conduct" is erroneous. The vast majority of circuits who have passed on this issue were not concerned with this issue. Moreover, the Act is not without limits. The Act specifically limits "extortion" to

acts that were induced by wrongful use or threatened use of "*force, violence, or fear, or under color of official right.*" 18 U.S.C. § 1951(b)(2) [emphasis added]. This distinguishes the situation in which persons agree to a peaceful boycott and picketing of a business to achieve legal objectives. Thus, Defendants' examples of chaining oneself to a redwood and blocking the entrance of an auditorium would not violate the Act unless done in a manner so as to threaten force, violence, or fear. To be sure, the use of the Hobbs Act in cases such as *Northeast Women's Center* and *Town of West Hartford* may approach the limits of the Act's reach. However, Defendants are simply incorrect in asserting that allowing the Hobbs Act predicate acts stand greases a "slippery slope."

Defendants' argument that this case is analogous to sit-ins at lunch counters and Rosa Parks' civil disobedience is correct, but that argument works in Plaintiffs' favor. Indeed, many who fought segregation using civil disobedience – as well as those who used violence – *were* arrested, jailed, and otherwise punished. The court reminds the Defendants that Dr. Martin Luther King, Jr. spent many days in jail for his civil disobedience. Indeed, many of the acts of civil disobedience during the 1960's were committed to test the constitutionality of the laws that were disobeyed. Because one fights a political cause does not mean that his conduct is immunized from liability. The law applies to all citizens in this country, even those who violate the law out of conscience. Currently, the law protects clinics who perform legal procedures, including abortions. Since *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), the Supreme Court has recognized a woman's right to have an abortion under certain circumstances without undue interference by the state. *See also Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992); *Hodgson v. Minnesota*, 497 U.S. 417, 110 S. Ct. 2926, 111 L. Ed. 2d 344 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S. Ct. 2972, 111 L. Ed. 2d 405 (1990).

2. Pleading a RICO Conspiracy

RICO prohibits any person from conspiring to violate any of its subsections. 18 U.S.C. § 1962(d). The core of a RICO civil conspiracy is an agreement to commit predicate acts. Defendants claim that the Complaint does not plead a RICO conspiracy violation with adequate specificity. The Scheidler Defendants and Migliorino argue that Plaintiffs have not alleged that there was an agreement between the parties to conduct an "enterprise." Defendants also argue that the failure to allege specifics about the "agreement" of the parties should be fatal. Plaintiffs maintain that they have alleged sufficient agreement to withstand this motion to dismiss the RICO conspiracy count.

A RICO conspiracy claim is governed by traditional concepts of conspiracy law, and "'should not require anything beyond that required for a conspiracy to violate any other crimes.'" *Schiffels*, 978 F.2d at 348 (7th Cir. 1992) (quoting *United States v. Neapolitan*, 791 F.2d 489, 497 (7th Cir. 1986), *cert. denied*, 479 U.S. 939, 940, 107 S. Ct. 421, 422, 93 L. Ed. 2d 371, 372 (1986)). "Section 1962(d)'s target, like that of all provisions prohibiting conspiracies, is the agreement to violate RICO's substantive provisions, not the actual violations themselves." *Schiffels*, 978 F.2d at 348 (citations omitted). "Thus, while a conspiracy to violate RICO requires an agreement to commit a pattern of predicate acts, it does not require that any predicate acts actually be committed." *Id.* (citations omitted). Thus, a civil RICO conspiracy complaint must allege, at the very least, an agreement to commit a pattern of predicate acts or facts from which such an agreement may be inferred. *Schiffels*, 978 F.2d at 352 (may allege facts from which agreement to violate § 1962 may be inferred); *Hecht*, 897 F.2d at 25 (must allege agreement specifically); *see Rose*, 871 F.2d at 366 (conspiracy claim must contain supporting facts which describe the conspiracy's general composition, its objectives, and the defendant's general role in the conspiracy). In other words, the agreement which is alleged under section 1962(d) must be pled with at least some degree of particularity.

All that is required by the Seventh Circuit at this stage is that the Plaintiffs allege (1) that each defendant agreed to conduct the affairs of an enterprise; (2) that each defendant agreed to the commission of at least two predicate acts (or to the furtherance of the enterprise through predicate acts); and (3) that each defendant knew that those predicate acts were part of a pattern of racketeering. *Schiffels*, 978 F.2d at 352; *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 939, 940, 107 S. Ct. 421, 422, 93 L. Ed. 2d 371, 372 (1986).

The Plaintiffs have met this burden as to all defendants except Wojnar and Project Life, who will be dismissed from this case. Plaintiffs have alleged that the other defendants (except Vital-Med) have agreed to drive all clinics who furnish abortion services out of business – in fact, that was the purpose of their organization of PLAN. The Complaint alleges that Scheidler and Terry sat on PLAN's leadership council. (Complaint §§ 11-12). PLAL and Project Life **participated**[21] in the annual PLAN meetings. (Complaint § 41 (PLAL only), 49 (PLAL only), 55, 58). Scholberg attended a "mini-conference" in St. Louis on December 14, 1986, as well as other PLAN meetings. (Complaint §§ 53, 55). Migliorino **participated** in the PLAN convention in Chicago from August 25 to 27, 1988 and forced Summit's prospective landlord to breach the lease between the parties. (Complaint § 58, 80-81). Operation Rescue was part of PLAN's project to blockade clinics in furtherance of PLAN's purpose to close abortion clinics down, and conducted several blockades in New York City, Long Island, Cherry Hill, New Jersey and Atlanta. (Complaint §§ 60, 63, 64, 66). Murphy organized some of the OR blockades and assisted in the theft and storage of fetal remains from Vital-Med. (Complaint §§ 65, 69, 70, 71). Murphy also **participated** in annual PLAN conventions. (Complaint § 84). Scholberg, for example, attended a PLAN "mini-conference" on December 14, 1986 in

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[21] See *supra* note 19 regarding what the plaintiffs must prove "participate" means in order to state a section 1962(c).

St. Louis, Missouri, took part in the annual PLAN convention in Atlanta, Georgia on May 2, 1987, and was the assistant director of PLAL from February, 1988 until approximately 1990. (Compl. §§ 13, 53, 54). PLAL allegedly took part in numerous PLAN conventions and **participated** in the organization and execution of several violent clinic blockades. (RICO Case Stmt. pp. 13-14).

Thus, plaintiffs have alleged that each of the defendants except Wojnar, Project Life, and Vital-Med have participated in PLAN's affairs as an enterprise, which is all that is required to plead substantive RICO. The rest of the defendants have an affiliation with PLAN and showed at least tacit agreement to "operate or manage" its affairs. The question is whether tacit agreement alone states a RICO conspiracy sufficient to withstand these motions to dismiss. Defendants have argued that this court should require proof of at least some overt act in furtherance of the conspiracy. In making this argument, defendants not only espouse the minority position, they ignore the law of this circuit. *Compare United States v. Garver*, 809 F.2d 1291 (7th Cir. 1987); *United States v. Neapolitan*, 791 F.2d 489, 499 (7th Cir.), *cert. denied*, 479 U.S. 939, 940, 107 S. Ct. 421, 422, 93 L. Ed. 2d 371, 372 (1986); *United States v. Angiulo*, 847 F.2d 956, 964 (1st Cir.), *cert. denied*, 488 U.S. 852, 928, 109 S. Ct. 138, 314, 102 L. Ed. 2d 110, 332 (1988); *United States v. Tripp*, 782 F.2d 38, 41 (6th Cir.), *cert. denied*, 475 U.S. 1128, 106 S. Ct. 1656, 90 L. Ed. 2d 199 (1986); *United States v. Local 560*, 780 F.2d 267, 294-95 (3d Cir. 1985), *cert. denied*, 476 U.S. 1140, 106 S. Ct. 2247, 90 L. Ed. 2d 693 (1986); *United States v. Pepe*, 747 F.2d 632, 659 (11th Cir. 1984); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011, 103 S. Ct. 1249, 1250, 75 L. Ed. 2d 479 (1983); *with United States v. Schell*, 775 F.2d 559, 568 (4th Cir. 1985), *cert. denied*, 475 U.S. 1098, 106 S. Ct. 1498, 89 L. Ed. 2d 898 (1986) (criminal RICO case in which proof of overt act in furtherance of the RICO conspiracy required); *United States v. Boldin*, 772 F.2d 719, 727 (11th Cir.

1985), *cert. denied*, 475 U.S. 1048, 106 S. Ct. 1269, 89 L. Ed. 2d 577 (1986).

The Seventh Circuit has stated "[t]he substantive proscriptions of the RICO statute apply to insiders and outsiders – those merely 'associated with' an enterprise – who participate directly and indirectly in the enterprise's affairs through a pattern of racketeering activity." *United States v. Garver*, 809 F.2d 1291 (7th Cir. 1987) (quoting *United States v. Elliott*, 571 F.2d 880, 903 (5th Cir. 1978)). In other words, if Plaintiffs have alleged that the Defendants committed acts in furtherance of PLAN, that is enough to show agreement to the conspiracy. Nothing more is required. The clearest form of agreement is Scheidler's and Terry's participation in PLAN's leadership council. By participating in this council, both Scheidler and Terry agreed to lead PLAN which, in turn, is alleged to be an illegal enterprise. This agreement to participate in PLAN's activities, coupled with the agreement to commit predicate acts, establishes "operation and management" and therefore potential liability against Terry and Scheidler. *See Reves*, 507 U.S. at ---, 113 S. Ct. at 1169.

"Participation" in PLAN's annual meetings by Murphy, Migliorino, and PLAL are closer calls. However, the allegations that these parties participated in meetings are coupled with allegations of the commission of other activities in furtherance of PLAN's purpose to shut down abortion clinics. Either one of these allegations, standing alone, would be insufficient to impose liability under § 1962(d). However, taken together, the allegations show sufficient agreement to meet the first prong of the *Schiffels* analysis (that each defendant agreed to conduct the affairs of the enterprise). Thus, the first prong of the analysis is satisfied.

The second prong in the analysis is whether each defendant agreed to the commission of at least agreed two predicate acts, or at least to the furtherance of the enterprise. *Schiffels*, 978 F.2d at 352; *Frymire v. Peat, Marwick, Mitchell & Co.*, 657 F. Supp. 889 (N.D. Ill. 1987); *United States v. Dempsey*, 768 F.

Supp. 1256 (N.D. Ill. 1990). Defendants contend that this statement of the law is insufficient. Defendants argue that they must have agreed to participate in each predicate act. This is patently wrong. All *Schiffels* requires in order for a defendant to be held liable for RICO conspiracy under § 1962(d) that he or she *agree* to the commission of at least two, but only two, predicate acts. *Schiffels*, 978 F.2d at 352. Moreover, there is some support within this circuit for an even lesser standard: that the defendants agree to conduct themselves on behalf of an enterprise. *United States v. Dempsey*, 768 F. Supp. 1256 (N.D. Ill. 1990) (Personal agreement to commit two predicate acts is not a prerequisite to RICO conspiracy liability); *Frymire v. Peat, Marwick, Mitchell & Co.*, 657 F. Supp. 889 (N.D. Ill. 1987).

This does not mean that each defendant must have *committed* two predicate acts – only that each *agree* to their commission. In other words, each defendant must have agreed to the commission of two acts in furtherance of the enterprise, or, at a minimum, agreed to the furtherance of the enterprise generally. The Complaint passes this test as to all defendants except Wojnar, who has never been alleged to have attended a PLAN conference or participated in PLAN's leadership.

The final prong of this test is whether the defendants knew that the acts were committed in a pattern of racketeering, *Schiffels*, 987 F.2d at 352, with "awareness of the nature and scope of the enterprise and intended to participate in it." *United States v. Muskovsky*, 863 F.2d 1319, 1324 (7th Cir. 1988), *cert. denied*, 489 U.S. 1067, 109 S. Ct. 1345, 103 L. Ed. 2d 813 (1989). Plaintiffs have met their burden here as well. PLAN's essential purpose, viewed in a light most favorable to Plaintiffs, was to engage in a pattern of racketeering activity (such as blockades and theft) that was designed to inflict, and has inflicted, injury on the business and property of plaintiff clinics who provide such services. (Complaint §§ 1, 41). Clearly, Scheidler and Terry, who sit on PLAN's leadership council, have sufficient understanding of PLAN's workings to know the

scope of the enterprise. This knowledge may also be imparted to PLAL, who in June of 1984, is alleged to have participated in the formulation of a six-month "plan of national activities." (Complaint § 37). Scholberg's awareness, viewed in light favorable to the Plaintiffs, may be inferred from his participation in PLAN's mini-conference on December 14, 1986, in which it was specifically agreed that one of their goals was to close down clinics that perform abortion. (Complaint §§ 53-54). OR's and Project Life's awareness, viewed in light most favorable to Plaintiffs, may be inferred from its "participation" in PLAN's annual conferences in which PLAN declared that it would try to stop abortions at clinics "by any and all means available. No abortion clinic will be spared," and where blockades were endorsed as necessary to take business away from the clinics. (Complaint §§ 55, 58). Murphy's awareness of the scope of the enterprise may be inferred from his "participation" in PLAN conferences, including being a featured speaker. (Complaint § 58). The court reminds the plaintiffs that it cannot conclude that simply attending one PLAN meeting would necessarily show that the defendant understood the scope of the enterprise.

Migliorino's awareness of the scope of the enterprise is tenuous. Migliorino allegedly participated in one PLAN conference on August 25-27, 1988, in which the overall goal of shutting abortion clinics down was discussed, and she was a speaker. (Compl. § 17). The substantive allegations against Migliorino involve one cluster of conduct surrounding the theft of fetal remains from Vital-Med, and one cluster involving interference with Summit's future landlord. (Complaint §§ 67-75, 80-81). The court concludes that these actions, taken together in a light most favorable to Plaintiffs, could show that Migliorino participated in and was aware of the scope of the enterprise, and she will not be dismissed now. It is possible that the Plaintiffs could prove some set of facts which would entitle them to relief against Migliorino under § 1962(d).

Wojnar, on the other hand, has not been named under "substantive RICO," and the only action that he is alleged to have participated in is the theft of the fetal remains. (Complaint §§ 82, 67-71). This need not be addressed here, as he will be dismissed on procedural grounds.[22] All other Defendants remain under section 1962(d), with the possible First Amendment concerns of this conclusion addressed below.

3. Other Predicate Acts

Defendants have made various arguments about each of the predicate acts alleged in the complaint. The court will address each in turn.

a. Travel Act and State Law Extortion as Predicate Acts

The Terry Defendants argue that the Travel Act allegations are insufficient because the Travel Act requires that underlying acts of extortion, bribery, or arson be pled. Moreover, the Defendants maintain that extortion under the Travel Act requires that property be obtained by the perpetrator. Plaintiffs argue that no property need be received by the perpetrator; all that need be satisfied is that state extortion statute be violated.

Plaintiffs maintain that the extortion laws of Alabama, Colorado, Florida, Hawaii, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New

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[22] Even if Wojnar were not dismissed on procedural grounds, this court would dismiss him from this complaint based on lack of awareness of the scope of the enterprise. Facts that would imply Wojnar's awareness of the scope of the enterprise are limited. Wojnar points out in his reply that the Amended RICO Case Statement implicates him in two other actions; a May 11, 1985 clinic invasion and blockade and a November 11, 1985 clinic invasion and blockade. (RICO Case Statement p. 36). All these actions could be individual occurrences, without any input from or understanding of the PLAN enterprise. Thus, Wojnar would have been dismissed here based on lack of knowledge of the scope of PLAN. *United States v. Muskovsky*, 863 F.2d 1319. Wojnar's arguments regarding the sufficiency of the predicates as alleged against him will not be addressed, nor will his statute of limitations argument be considered; both of these arguments are moot as to him.

Hampshire, New Mexico, North Dakota, Rhode Island, Tennessee, Texas, Vermont, Wisconsin, and Wyoming do not require that the defendant receive property from the victim; only that the victim to give up either a tangible or an intangible property right.[23] Plaintiffs also argue that Defendants violated these laws.

The Travel Act was primarily designed to stem the "'clandestine flow of profits' and to be of 'material assistance' to the States in combating pernicious undertakings which cross State lines." *Nardello*, 393 U.S. at 292, 89 S. Ct. at 538 (quoting S. Rep. No. 644, 87th Cong. 1st Sess., 4 (1961)). The Travel Act reaches:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to –
>
> (1) distribute the proceeds of any unlawful activity; or
>
> (2) commit any crime of violence to further any unlawful activity; or
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity.
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3). . . .

18 U.S.C. § 1952. Unlawful activity as defined in the Travel Act includes extortion, bribery, and arson "in violation of the laws of the State in which committed or of the United States." 18 U.S.C. § 1952(b). Unlike the Hobbs Act, the Travel Act does not define "extortion" in the statute; it leaves the definition up to individual state law. *United States v. Nardello*,

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[23] The clinics wish to maintain this suit as a class action, which could bring virtually every other state's extortion statute into play. However, because the class has not yet been certified, there is no need to address those other statutes at this time.

393 U.S. 286, 289 n. 3, 89 S. Ct. 534, 536 n. 3 (1969). Thus, if the violations of the underlying state law extortion statutes are well pled, so are the Travel Act violations.

At common law, "extortion" could only be committed by a public official who obtained property not due to him or his office under color of law. *Id.* Many states have expanded upon such definition to include acts committed by private individuals whereby property is obtained by force, fear, or threat. *Id.* DWHO and Summit (Delaware and Wisconsin residents, respectively) have each pled violations of their state extortion statutes. Only Delaware and Wisconsin law will be addressed because, although plaintiffs wish to maintain this as a class action, the only plaintiffs currently before the court are DWHO and Summit.

The relevant Delaware statute provides:

> A person commits extortion when, with the intent . . . he compels or induced another person to deliver property to himself of to a third person by means of instilling in him a fear that, if the property is not so delivered, the defendant or another will:
>
> (1) Cause physical injury to anyone; or
>
> (2) Cause damage to property; or
>
> (3) Engage in other conduct constituting a crime; or
>
> (4) Accuse anyone of a crime or cause criminal charges to be instituted against him; or
>
> (5) Expose a secret or publicize an asserted fact, whether true or false, tending to subject anyone to hatred, contempt, or ridicule; or
>
> (6) Falsely testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

> (7) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely; or
>
> (8) Perform any other act which is calculated to harm another person materially with respect to his health, safety, business, calling, career, financial condition, reputation, or personal relationships.

Del. Cod. Ann. tit. 11, § 846 (1990).

Defendants allege conclusorily that this statute requires obtaining property and plaintiffs have failed to allege this element. Plaintiffs maintain that they *have* alleged that Defendants obtained property from them because Delaware's definition of property is broad enough to encompass DWHO's agreement not to enter business relationships with their patients.

Only a state court can authoritatively interpret its own state statutes and laws. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369, 91 S. Ct. 1400, 1404, 28 L. Ed. 2d 822 (1971); *Waldron v. McAtee*, 723 F.2d 1348, 1352 (7th Cir. 1983). Delaware apparently has not construed the definition of property in this context. The parties have cited no authority on the matter, and the court's independent research has found a similar void. In the absence of guidance from Delaware state courts, a federal court should decide the issue in a way in which it believes the highest state court would rule of the issue were presented to it. *L.S. Heath & Son, Inc. v. AT & T Information Systems, Inc.*, 9 F.3d 561, 574 (7th Cir. 1993). This is difficult here, as it requires this court, sitting in Illinois, to determine what the Delaware Supreme Court would decide. In this difficult circumstance, this court will focus on the language of the statute itself.

In its statute on theft, Delaware's definition of property is: "*anything of value except land,* and includes . . . documents although the rights represented thereby have no physical location, contract, rights, choses in action. . . ." Del. Cod. Ann.

tit. 11 § 857(4) [emphasis added]. Moreover, Delaware Supreme Court *has* concluded: "[t]he offense [of extortion] is complete when the threatening statement or communication is made, or is caused to be made with the intent to extort or wrongfully gain money or other property." *Bilinski v. State*, 462 A.2d 409 (Del.1983) (quoting *Bove v. State*, 33 Del. 229, 134 A. 630 (Del. Supr.1926)).

Property is defined as "anything of value except land . . . including rights that have no physical location." Del. Cod. Ann. tit. 11 § 857(4). It appears that the Delaware legislature attempted to make its theft statutes as broad as possible in order to combat crime most effectively. This court has already concluded that in the Hobbs Act context, the right to do business and conduct business relationships is protected "property." *See supra* at 1072. Using a parallel analysis here, this court concludes that Delaware intended to have its crime statute reach as broadly as possible, just as Congress intended to allow the Hobbs Act broad scope. DWHO's right to conduct business relationships with both its patients and its personnel are therefore protected by Del. Cod. Ann. tit. 11 § 846. Plaintiffs have pled that the Defendants obtained, or attempted to obtain the clinics' agreement not to enter into business relationships with patients, doctors, and personnel. Plaintiffs specifically pled that Scheidler entered DWHO, threatened clinic administrator Cathy Conner. (Complaint § 46). Plaintiffs allege that on April 12, 1986, Scheidler threatened that anti-abortionists would "get rid of" clinics such as DWHO. (Complaint § 47). The Plaintiffs' allegations satisfy Delaware § 846(8), which prohibits threatening to perform acts calculated to harm DWHO's business relationships. The Delaware extortion allegations are well-pled as either attempted or actual extortion.[24] The Travel Act is violated when the underlying

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[24] To establish the commission of attempted extortion, Plaintiffs must show, inter alia, that the defendant took a substantial step toward "instilling" fear in another that he would cause "physical injury to anyone" or "damage to property," if property other than his own were not delivered to him. *Bilinski*

state's law is violated and that violation affects interstate commerce. Thus, the Travel Act allegations, as alleged by DWHO, are also well-pled.

The same arguments are maintained by Summit regarding the Wisconsin extortion statute. The relevant Wisconsin statute prohibits individuals from:

> [V]erbally or by any written communication, maliciously threaten[ing] to accuse or accuses another of any crime or offense, or threatening or commit [ing] any injury to the person, property, business, profession, calling or trade, or the profits and income of any business, profession, calling, or trade of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against the person's will or omit to do any lawful act . . .

Wisc. Stat. Ann. § 943.30 (1995).

The Terry Defendants claim that the phrase "with intent thereby to extort money or any pecuniary advantage whatever" combined with the disjunctive "or with intent to compel the person so threatened to do any act against the person's will . . ." shows that this statute was designed to address two offenses; extortion by the first clause and coercion by the second. Further, Defendants point out that only extortion, and not coercion, is a predicate RICO offense. Thus, they argue, the Wisconsin extortion statute does not reach the conduct alleged in the Complaint.

Plaintiffs maintain that the Defendants have misconstrued the Wisconsin statute, and they cite both state and federal law in support of their position that Wisconsin does not require that property be "received." The Wisconsin Court of Appeals has held that "extortion may . . . be committed if no property or money is transferred, but the victim is coerced to do something

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v. State, 462 A.2d 409 (Del.1983); Del.Cod.Ann. tit. 11 §§ 531, 846(1), (2).

against his or her will." *State v. Dauer*, 174 Wis.2d 418, 497 N.W.2d 766, 771 (App.1993). However, this conclusion was made in the context of distinguishing the Wisconsin extortion statute from the state robbery statute. Thus, this analysis is not as forceful as if the court had decided a case similar to this one, where the extortion/coercion distinction was at issue. However, no such a case has been cited or found. Thus, it is fair to conclude, in the absence of contrary authority, that Wisconsin does not require the receipt of property to be proven in order to establish an extortion offense.

Moreover, intangible property rights, such as choses in action, have been held to constitute "property" under Wisconsin's § 943.30. *State v. Manthey*, 169 Wis.2d 673, 487 N.W.2d 44 (App.1992), *rev. denied,* 491 N.W.2d 768 (Wis.1992) (Defendant who was prospective witness in a civil action and who threatened to have extensive memory lapses at trial unless she was paid to testify committed extortion by threatening to injure litigant's property interest in the suit). Thus, Defendant's argument that the right to conduct business relations is not recognized in Wisconsin is invalid. The Complaint's allegations that Plaintiffs were forced to give up their right to conduct business relationships state a valid claim for relief under Wisconsin law. The Travel Act allegations are likewise valid, as the underlying state law claims have been properly pled. *See United States v. Nardello*, 393 U.S. 286, 89 S. Ct. 534, 536 n. 3, 21 L. Ed. 2d 487 (1969).

b. Theft of Fetal Remains As Predicate Act

Plaintiffs have pled violations of 18 U.S.C. § 659,[25] which prohibits theft from interstate shipment, as predicate RICO acts. The section 659 allegations arise out of Defendants' alleged theft of fetal remains and medical information thereon from Vital-Med's facility. The Scheidler Defendants claim that these allegations do not state valid predicate RICO acts because the fetal remains were not alleged to have been valued over one hundred dollars, as required by RICO 18 U.S.C. § 1961(1). Plaintiffs argue that they have pled enough to withstand this motion to dismiss, and that they will prove at trial that the fetal remains were worth "far more" than the one hundred dollar requirement.

In order for a section 659 violation to be a predicate act under section 1961(1), the act must be felonious. Under section 659, a defendant may only be convicted of a felony if the value of the property in question is at least one hundred dollars. *United States v. Brookins*, 52 F.3d 615, 619 (7th Cir. 1995). "Value" is defined in section 659 as "face par or market value, whichever is greater." *Id.* (quoting *United States v. Ditata*, 469 F.2d 1270, 1273 n. 3 (7th Cir. 1972). Market value, in turn, is "the price a willing buyer will pay a willing seller at the time and the place the property was stolen or at any time during the receipt or concealment of the property." *Id.* (quoting *United*

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[25] 18 U.S.C. § 659 provides:

Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, stationhouse, platform or depot . . . with intent to convert to his own use any goods or chattels moving as or which are a part or which constitute an interstate or foreign shipment of freight, express or other property; or

. . . . .

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money baggage, goods, or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

States v. Bakken, 734 F.2d 1273, 1278 (7th Cir. 1984). The *Brookins* court was concerned with the sufficiency of the evidence which showed that the defendant was guilty of stealing a camera. Evidence was admitted showing that the undercover agent who arrested the defendant had been offered the camera for $350, to which the agent eventually agreed. *Brookins*, 52 F.3d at 617-18. The court concluded that this evidence was "more than sufficient" to establish the value of the camera over one hundred dollars. *Id.* at 619-20.

This case has a different procedural posture. Instead of reviewing a trial court's conclusion of the value of the property, this challenge comes in the form of a motion to dismiss. This court concludes that the Plaintiffs should have the opportunity to show that the fetal remains and the accompanying medical information were worth more than $100. It would be premature to dismiss the section 659 allegations without allowing Plaintiffs such an opportunity.

That being said, this court emphasizes the test set forth in Brookins will guide the evaluation of the evidence of the value of the property. However, in light of the lenient pleading requirements of the Federal Rules of Civil Procedure, the court will not dismiss the section 659 violations at this time. The Defendants are on notice of what dates, times, and actions support the Section 659 claim; that is all that is required of the Complaint at this juncture.

C. Availability of Injunctive Relief

The Plaintiffs have sued under 18 U.S.C. § 1964(c), which provides standing for private plaintiffs to enforce RICO. The subsection provides that any civil plaintiff "shall recover" treble damages and a reasonable attorney's fee. The Scheidler Defendants contend that this narrow statement of available relief precludes the Plaintiffs from suing to obtain equitable relief. Plaintiffs contend that they are entitled to seek injunctive relief, and, moreover, even if it is not so entitled, the form of relief to be obtained is "not a Rule 12(b)(6) issue."

Although Plaintiffs may be correct that, generally speaking, the form of relief is not an issue upon which a court could base a dismissal, this case raises peculiar issues in a unique posture. *See Doe v. U.S. Dept. of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985) (court cannot dismiss a claim as long as some relief may be granted from facts alleged on the face of the complaint, citing 5 Wright & Miller, *Federal Practice and Procedure* § 1357 at 602 and n. 77 (other citations omitted)); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (court must be able to address the alleged injury with a favorable decision).

Section 1964, entitled "Civil Remedies," provides in subsection (a):

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by *issuing appropriate orders, including, but not limited to:* ordering any person to divest himself of any interest, direct or ...direct, in any enterprise; *imposing reasonable restrictions on the future activities* or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

[Emphasis added]. Thus, it is clear that Congress intended to allow courts to issue injunctive relief.

Nonetheless, the circuits are divided on whether private parties may petition the court for injunctions for civil RICO violations. *Conkling v. Turner*, 18 F.3d 1285, 1296 (5th Cir. 1994) (declining to reach the issue, but noting the split in the circuits). Some courts have concluded that this relief is not available to private parties, *see Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986) (expressly holding injunctive relief not available to private litigants under

RICO), *cert. denied,* 479 U.S. 1103, 107 S. Ct. 1336, 94 L. Ed. 2d 187 (1987); *Dan River, Inc. v. Icahn*, 701 F.2d 278, 290 (4th Cir. 1983) ("substantial doubt about whether RICO grants private parties . . . a cause of action for equitable relief."); *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987, 994 (N.D. Ill. 1984) (RICO does not permit equitable remedies such as declaratory judgment and recision), while others have concluded that private plaintiffs *may* avail themselves of equitable remedies. *Lincoln House, Inc. v. Dupre*, 903 F.2d 845 (1st Cir. 1990) (declining to reach the issue, but assuming that the district court could grant equitable relief); *In re Fredeman Litigation*, 843 F.2d 821, 830 (5th Cir. 1988) (holding that RICO does not authorize injunctive relief against transfer of all defendant's assets in a RICO action for treble damages, but not deciding "whether all forms of injunctive or other equitable relief are foreclosed to private plaintiffs under RICO"); *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34 (1st Cir. 1986) (in order to obtain injunctive relief, plaintiff must show irreparable injury, substantial likelihood of success on the merits, a weighing of the equities in the plaintiff's favor, and a public benefit); *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390 (5th Cir. 1986) (same); *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986) (same); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (implying that equitable relief may be available under RICO), *aff'd on reh'g,* 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied,* 464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y.1983) (reasoning that Congress did not intend "to deprive the district court of its traditional equitable jurisdiction" to grant injunctive relief for alleged violations of RICO statute), *aff'd other grounds,* 730 F.2d 905 (2d Cir. 1984), *see also* Batista, *Civil RICO Practice Manual* 169 (1987) (§ 6.13--The Availability of Injunctive Relief).

The Seventh Circuit has not yet ruled on this issue. However, in light of the Supreme Court's instruction that

"RICO is to be read broadly" and that the very purpose of the statute is to "supplement and strengthen the means already available for fighting crime," *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 498, 105 S. Ct. 3275, 3286, 87 L. Ed. 2d 346 this court is reluctant to read the statute in a limited way. Moreover, there is substantial authority for allowing private parties to seek equitable remedies, and even though that authority does not arise in this circuit, this court is persuaded by the rationale in those opinions. The court concludes that the Plaintiffs may seek the equitable remedies they ask for in the Third Amended Complaint. *Lincoln House*, 903 F.2d 845 (1st Cir. 1990); *In re Fredeman Litigation*, 843 F.2d 821, 830 (5th Cir. 1988); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982), *aff'd on reh'g*, 710 F.2d 1361 (8th Cir.) (en banc), *cert. denied*, 464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y.1983). Having concluded that the court's power encompasses the Plaintiffs' prayer for the court to "enjoin Defendants and their co-conspirators from further racketeering activity," the court notes that any potential injunction or "reasonable restrictions" imposed must pass muster under the First Amendment.

IV. First Amendment Concerns

Just two issues remain before the court at this time; both involve claimed constitutional rights. These issues are addressed last because, although they are part of the mandate of the Seventh Circuit, courts are constrained to decide cases without reference to the federal constitution whenever possible. *Redgrave v. Boston Symphony Orchestra Inc.*, 855 F.2d 888, 911 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043, 109 S. Ct. 869, 102 L. Ed. 2d 993 (1989). The first issue deals with the extent to which the First Amendment protects Defendants' actions, and the second concerns the facial constitutionality of the RICO statute.

A. Freedom of Speech

The Seventh Circuit directed this court to address, "if necessary, . . . which of the defendants' activities, as alleged, are protected by the First Amendment to the United States Constitution." *Scheidler*, 25 F.3d 1053, 1994 WL 196761 at *2.

This direction follows Justice Souter's comment in concurrence: "even in a cases where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaging in protected expression." *Scheidler*, 510 U.S. at ---, 114 S. Ct. at 807 (Souter, J. concurring).

The Defendants argue that the use of civil RICO is inappropriate in this context because, even if they did commit predicate acts, their actions, including the allegations of attempt, advocacy, and commission of arson, kidnapping and murder, were done in the furtherance of their political beliefs. Therefore, Defendants argue, those actions are protected by the First Amendment. Defendants focus on three paragraphs containing predicate acts under count I (RICO § 1962(c)) of the Complaint in support of their position: paragraphs 87N, 87O, and 87Q. Paragraph 87N alleges that the RICO Defendants committed a predicate act of:

> **Encouraging, organizing, and inciting** the commission of arson, in violation of state arson and extortion laws, including but not limited to **[1] urging** the destruction of "bricks and mortar," and **[2] declaring** that arson is not "violence"; **[3] applauding and endorsing** acts of arson by co- conspirators'; **[4] encouraging, inciting and inducing** acts of arson through letters, speeches, films, various writings, and other media; **[5] urging** followers to act as if violence were permissible if it were to stop abortions; **[6] praising** the depiction of co-conspirators in front of clinics destroyed by arson; **[7] teaching** followers (including highly susceptible and vulnerable individuals) that arson is

> trivial and is justified if it prevents an abortion; **[8] encouraging** those who have committed arson to keep up their work **and assisting** them in doing so; **[9] ridiculing** those who reject force and violence as a method to express their opposition to abortion, including but not limited to calling them "wimps," "wimps-for-life" and similar expressions; and **[10] encouraging** followers to emulate those who have been convicted of arson on repeated occasions. [Numbers and emphasis added].

Paragraph 87O alleges that the RICO Defendants "attempt[ed] and conspir[ed] to kidnap . . . **by encouraging, organizing, and inciting** the kidnaping of doctors who perform abortion . . . [emphasis added]" Paragraph 87Q alleges that the RICO Defendants attempted to commit murder **"by encouraging and inciting** members of the enterprise to commit murder. [emphasis added]" Although the Defendants do not cite other paragraphs of the complaint which may run afoul of the First Amendment, there are others which the court, in an independent analysis, believes call the First Amendment into question. These paragraphs[26] and the allegations contained therein will also be addressed because the Seventh Circuit has mandated that this be done.

Plaintiffs argue that they treasure the First Amendment and its protections as much as the Defendants, but that Defendants' acts are not immunized simply because they were committed with a political goal. Plaintiffs contend that the actions alleged in the complaint go beyond the protections of free speech and move into unprotected, violent action and/or unconstitutionally protected "incitement" speech.[27] Plaintiffs argue that to the

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[26] The paragraphs are: §§ 28, 29, 30, 33, 36, 42, 45, 47, 57, 58, and 74.

[27] Plaintiffs also make significantly broader arguments regarding the First Amendment's application to the Complaint. For example, they argue that their reference to Scheidler's book *Closed: 99 Ways to Stop Abortion* in paragraphs 29 and 30 of the Complaint is admissible to show Scheidler's intent, even though the book is clearly covered by the First Amendment's

extent that free speech issues are implicated by the Complaint, they may be adequately addressed by giving a proper jury instruction at the time of trial. (Response p. 4 n. 6). Plaintiffs also argue that the Defendants' speech and actions have created a "context of violence" which causes them to fear for their safety if they were to pursue their rights as clinics to operate. Because the speech and actions created this "context," Plaintiffs argue, both the speech and the acts run afoul of the First Amendment and should be enjoined.

Central to the concept of civil liberties in this society is the idea of freedom of speech. The First Amendment provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the government for a redress of grievance.

U.S. Const. amend. I. "The First Amendment is a charter for government, not an institution of learning. 'Free trade of ideas' means free trade in the opportunity to persuade to action, not merely to describe facts." *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, 3423, 73 L. Ed. 2d 1215 (1982) (quoting *Thomas v. Collins*, 323 U.S. 516, 537, 65 S. Ct. 315, 325, 89 L. Ed. 430 (1945)). Further, as Justice Brandeis aptly stated in his concurrence in *Whitney v. California*, 274 U.S. 357, 375, 377, 47 S. Ct. 641, 71 L. Ed. 1095 (1927) (Brandeis, J. joined by Holmes, J., concurring), *overruled other grounds, Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969), freedom of conscience is essential to the "discovery and spread of political truth," to "stable government," and to "political change." Courts must therefore be extremely cautious of interpreting this important right in a limiting fashion. A key difficulty in freedom of speech

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protection and cannot be argued to be a predicate act. (Response p. 2 n. 1). None of the defendants chose to raise this issue in their motions to dismiss. Nonetheless, this court must address them as mandated by the Seventh Circuit.

litigation, and the critical problem in this case, is defining "speech" distinct from the actions surrounding it and from the actions the speech may, in turn, produce. *See* Lawrence Tribe, *American Constitutional Law* 788 (2d Ed.1988).

The essential issue in this analysis is whether the words used by the Defendants fall into the "fighting words" exception to First Amendment protection. If the speech that Defendants engaged in falls within this exception, this court has authority to enjoin similar future speech. *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) is the current state of the law regarding "subversive advocacy," or "fighting words," or speech that calls for or tends to produce or incite violence. In *Brandenburg*, the Supreme Court struck down an Ohio law which was not "directed to inciting or producing *imminent* lawless action [emphasis added]" and "likely to produce such action" yet nonetheless prohibited speech. *Brandenburg*, 395 U.S. at 447, 89 S. Ct. at 1829. *The only way that a state may regulate speech is if the speech* does *call for immediate illegal acts which are likely to occur following the speech.*

Thus, in order to qualify as "fighting words," the speech must (1) incite imminent illegal activity and (2) be likely to produce such activity. The freedom of speech is an essential right which is to be abridged only where "emergency . . . makes it immediately dangerous to leave the correction to time." *Abrams v. United States*, 250 U.S. 616, 630-31, 40 S. Ct. 17, 22, 63 L. Ed. 1173 (1919) (Holmes, J. dissenting); *see* Tribe, *American Constitutional Law* at 844.

Some commentators have argued that the "imminence" standard requires that the time between the speech and the action be so brief that there is no opportunity for rebuttal or reflection. *See* David A.J. Richards, *Toleration and the Constitution* (1986) (Arguing that the best way to protect free speech is to allow the freedom to reach the boundaries of "equal liberty of conscience," which is the essential element of this society.) Plainly, "the mere abstract teaching . . . of the moral

propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Brandenburg*, 395 U.S. at 448, 89 S. Ct. at 1830 (quoting *Noto v. United States*, 367 U.S. 290, 297-98, 81 S. Ct. 1517, 1520-21, 6 L. Ed. 2d 836 (1961).

In *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 102 S. Ct. 3409, the Court reversed a judgment which awarded damages caused by a seven-year boycott organized by the plaintiff NAACP and its members, which was imposed against defendants, who were white-owned businesses, to achieve integration. *Claiborne Hardware Co.* is factually similar to this case because both cases dealt with political protest mixed with violence. The *Claiborne Hardware Co.* boycott consisted of picketing and "disciplining" African Americans who continued to patronize white-owned stores. The "discipline" consisted of members of the NAACP, called "Black Hats" or "Deacons," who stood outside white-owned stores and identified African Americans who transacted business with them. The Deacons then published the names of the "offenders" both orally at the NAACP meetings, and in a paper called the "Black Times." The lower court also observed that four incidents which clearly involved violence occurred because the victims ignored the boycott, and noted six others that showed an "unlawful form of discipline was applied to certain boycott violators." *Claiborne*, 458 U.S. at 905, 102 S. Ct. at 3421. Half of those ten incidents were found to have occurred in 1966, but none were conclusively found to have occurred after 1966, even though the suit was brought in late 1969. The Court concluded that the "coercion, intimidation, and threats" were "part of the boycott activity" and were protected by the First Amendment. *Claiborne*, 458 U.S. at 906, 102 S. Ct. at 3423. However, and importantly, the Court expressly distinguished *Milk Wagon Drivers Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836, *reh'g denied*, 312 U.S. 715, 61 S. Ct. 803, 85 L. Ed. 1145 (1941). In *Milk Wagon Drivers* the Court upheld an injunction that prohibited both violent and nonviolent picketing and protesting activity

because of the violent environment and conduct surrounding the activity. The *Claiborne* court distinguished *Milk Wagon Drivers* by stating, "in this case [*Claiborne*] the Mississippi Supreme Court has relied on isolated acts of violence during a limited period to uphold respondents' recovery of all business losses sustained over a 7-year span." *Claiborne*, 458 U.S. at 924, 102 S. Ct. at 3431. Thus, the Court gave great importance to the context of the violence in which the speech/nonspeech activities rested. Where there is a context of violence over the entire time span of the suit, and that violence is of a serious nature, such as was the case in *Milk Wagon Drivers* (in which at least fifty instances of window-smashing, explosive bombings, stench bombs, destruction of trucks and stores, serious injury to drivers and storekeepers, arson, threats and the like), the Court gives greater weight to the protection of citizens and property and less to free speech concerns. The protest speech in *Milk Wagon Drivers* occurred by both words and violent actions. Indeed, that court constructed the question as "whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are *enmeshed* with contemporaneously violent conduct which is concededly outlawed." *Milk Wagon Drivers*, 312 U.S. at 292, 61 S. Ct. at 554. The violence which was used to protest the method of milk distribution was plainly not protected by the First Amendment, although the picketing plainly was. However, where the protest activity is relatively peaceful, with only minor breaches of the peace, it is more likely that the Court will guard free speech privileges of the protesters with greater vigilance. More importantly, when peaceful and violent activity are "enmeshed," that fact counsels in favor of regulation of the entire range of action.

Plaintiffs contend that this case is analogous to *Milk Wagon Drivers* and argue that the context in which the Defendants' speech was conducted should remove it from the protection of the First Amendment. Plaintiffs have alleged the following specific acts which provide a context of violence in which Defendants' alleged "speech" took place:

(a) Between June, 1984 and the end of 1985: forty (40) acts of arson on clinics that provide abortion (§ 40);

(b) In March of 1986: one attempted arson (§ 44); March 26, 1986: one occurrence of destruction of clinic property (§ 43); assault and physical injury of five persons, four on March 26, 1986 and one in December of 1987 (§§ 57, 87D);

(c) On April 12, 1986: one occurrence of criminal trespass and harassment (§ 48);

(d) Twelve individually cited violent blockades in which at least one of the Defendants participated and, inter alia, blocked traffic in and out of the clinics and in which confrontations with police and patients occurred and hundreds of arrests were made on April 19, 1986, November 28, 1986, November 29, 1986, April 30 through May 2, 1987 (one per day – three total), August 27, 1987, November 28, 1987, and May 2 through 5, 1988 (one per day – four total) (§§ 44, 49, 51, 55, 58, 62, 63, 87D, 87I(1));

(e) Beginning July 19, 1988 and continuing until December 1988, a series of Operation Rescue actions occurred in Atlanta, Georgia (§ 64);

(f) On October 29, 1988, which was called the "National Day of Rescue" pro- life activists blockaded forty clinics across the country and in Toronto, Canada (§ 65);

(g) Local Operation Rescue activities have continuously taken place across the country, in which more than 10,000 participants have been arrested (§ 66);

(h) On March 10, 1993, conspiracy to commit and commission of the murder of Dr. David Gunn.

Thus, a total of over one hundred violent events have been specifically alleged within the nine-year time span covered by the Third Amended Complaint. Although these acts must be assumed to be true by this court, they do not necessarily mandate that all of Defendants' free speech rights have been

forfeited. "Right to free speech in the future cannot be forfeited because of dissociated acts of past violence." *Milk Wagon Drivers*, 312 U.S. at 296, 61 S. Ct. at 556. Protected free speech, which involves words and not actions, is not implicated by the activities outlined above in (a) through (h). The Plaintiffs must allege that the protected speech, such as inciting, encouraging, and the like, is "enmeshed" in the violent acts. Specifically, Plaintiffs must allege that the Defendants' speech activity was so closely linked in time and place to the violence that the law must intervene and prohibit the provocation from occurring. They have not done so here.

Moreover, this complaint seeks not only to enjoin the Defendants from "further racketeering activity," which may or may not include speech, but it also seeks to impose civil damages for activities which clearly include speech to some degree. *See* §§ 87N, 87O, 87Q (alleging predicate acts consisting of encouraging, organizing, inciting, urging, declaring, endorsing, praising, teaching, and ridiculing others to further the pro-life cause) and p. 67, *supra*. These verbs all describe *speech* and not violence in any way. The alleged speech is patently and firmly within the boundaries of freedom of expression. Those paragraphs must be stricken from the Complaint, as they do not allege predicate acts – rather, they allege legal protest actions protected by the freedom of expression.

Moreover, the protections of the First Amendment are usually used as a shield and not as a sword. *Redgrave v. Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189, 1200 (D. Mass. 1985) ("The legal system stands ready to shield freedom against unlawful government intrusion, but reluctant to use the sword of damages to vindicate one claim of freedom by striking down another."), *modified*, 855 F.2d 888 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043, 109 S. Ct. 869, 102 L. Ed. 2d 993 (1989). RICO was not enacted to collapse the freedom of speech; it was enacted to give federal peace officers a powerful weapon with which to fight organized crime.

The Defendants have called into question only three paragraphs, while the court has found a total of seventeen which implicate the First Amendment. As noted, the Seventh Circuit mandated that this court address the issue of the First Amendment as it relates to this action. This court is obliged to address "which of the defendants' activities, as alleged, are protected by the First Amendment," and therefore all seventeen paragraphs will be discussed.

Encouraging activity which was not immediately followed by violence is protected by the First Amendment. "Immediately" means within a period which does not give time for reflection. Although the Supreme Court has not set forth a "bright-line" interpretation of what "immediately" means in this context, this court assumes it to mean at maximum a twenty-four hour period. The Plaintiffs' attempt to analogize to the situation in *Milk Wagon Drivers* fails because the protected speech and the violent activities are insufficiently linked. Having stated the court's conclusion, the specific paragraphs of the compliant need to be addressed. Unfortunately, Plaintiffs have alleged both protected speech and unprotected lawless action in the same paragraph, so it is difficult to specifically navigate and strike[28] full paragraphs. Moreover, as noted above,

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[28] To strike portions of a complaint, the allegations being challenged must be so unrelated to plaintiff's claims as to be void of merit and unworthy of any consideration. *Robinson v. The Midlane Club, Inc.*, 1994 WL 577219 *2 (N.D. Ill. Oct. 19, 1994). Further, the presence of the references sought to be stricken must be prejudicial to the movant. *Pelech v. Klaff-Joss, L.P.*, 828 F. Supp. 525, 536-37 (N.D. Ill. 1993) (acknowledging the seriousness implied in any poorly supported allegations, but denying motion to strike where argument at issue was not devoid of merit); *Tektel, Inc. v. Maier*, 813 F. Supp. 1331, 1334 (N.D. Ill. 1992). Motions to strike are brought pursuant to Fed. R. Civ. P. 12(f) and are generally disfavored. *Robinson v. The Midlane Club, Inc*, 1994 WL 577219 *2 (N.D. Ill. Oct. 19, 1994), *see, e.g., Imperial Constr. Management Corp. v. Laborers' Int'l Union, Local 96*, 818 F. Supp. 1179, 1186 (N.D. Ill. 1993) (granting a motion to strike affirmative defenses because they only added clutter to the case and because they were without merit, but upholding general rule disfavoring such motions); *Tektel*, 813 F. Supp. at 1334; *Van Schouwen v. Connaught Corp.*, 782 F. Supp. 1240,

it is unclear what weight several of the paragraphs are to be given because they have not been incorporated into count I, although they were incorporated into count II.

Paragraphs 29, 30, and 33[29] will be stricken in their entirety because they allege protected speech without any direct correlation with violent activity other than the "violent context" which was outlined above. This violent context, standing alone, simply cannot support the expansive restraint that Plaintiffs would impose on Defendants' freedom of speech. The phrase

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1245 (N.D. Ill. 1991); 5A Charles Alan Wright, Arthur R. Miller, Federal Practice and Procedure § 1380, at 647 (1990). Nonetheless, striking portions of a complaint is appropriate when "certain references in a pleading . . . not the entire paragraphs containing them should be stricken." *Id.* at 651. This court will, to the extent necessary, strike only those portions of the Complaint which are wholly void of merit and serve only to implicate validly exercised First Amendment activities.

[29] Paragraph 29 provides:

> Scheidler has distributed throughout the United States a manual, *Closed: 99 Ways to Stop Abortion,* outlining methods intended to be used to interfere with clinics such as DWHO and Summit. Scheidler's manual encourages the use of predicate acts of racketeering activity to drive clinics such as DWHO and Summit out of business.

Paragraph 30 provides:

> Scheidler has traveled throughout the country training other persons to use racketeering activity, including but not limited to the methods outlined in *Closed: 99 Ways to Stop Abortion.*

Paragraph 33 provides:

> Terry has traveled throughout the country encouraging, organizing, and training other persons to use racketeering activity, including blockades designed to stop ingress and egress to the clinics, to close clinics that provide abortion and this force Plaintiffs to give up property rights.

in paragraph 28[30] "encouraging others to participate in" will be stricken, as it does not apparently relate to violent activity.

Paragraph 36[31] directly correlates Scheidler's conference workshop presentation and a blockade at the Women's Awareness Clinic in Fort Lauderdale, Florida. Although Plaintiffs do not specifically allege that the blockade was violent, the court cannot conclude with certainty, given the violent factual context of many of these blockades, that this blockade was completely peaceful. Thus, in this posture, the court cannot strike the allegations contained therein.

Paragraph 42[32] is closely linked in time with a violent invasion of the Ladies Center of Pensacola, Inc. and therefore

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[30] Paragraph 28 provides:

> In pursuit of their goal to drive every clinic out of business, Defendants (except Vital-Med) have traveled throughout the country, and/or used interstate telephone lines and U.S. Mail services for the purposes of engaging in, and/or *encouraging others to participate in*, their enterprise, which is devoted to the commission of racketeering activity at clinics such as DWHO and Summit. [Emphasis added]

[31] Paragraph 36 provides:

> From May 10 to 12, 1984, the first National Pro-Life Conference, entitled "Action for Life" was held in Ft. Lauderdale, Florida. Scheidler presented a conference workshop on "Effective Confrontation: A 'How-To' of Picketing, Leafletting, Sit-Ins and Blitzes." He also spoke at a "Ready for Action" rally. As part of their training, approximately 200 conference participants were taken by bus from the convention to the Women's Awareness Clinic, a Fort Lauderdale clinic that offers abortion services. They surrounded the clinic, blocking all entrances and exits.

[32] Paragraph 42 provides:

> On March 25, 1986, Scheidler, PLAL, and others led a workshop in Pensacola, Florida, designed to encourage local residents to join them in using racketeering activity to drive clinics that perform abortion out of business.

will not be stricken. Paragraphs 45 and 47[33] are likewise linked in time with Scheidler's criminal trespass and harassment occurring on April 11, 1986 at DWHO. Although these activities are not violent per se, they are criminal. However, a showing of non-violent criminal activity alone is not enough. The freedom of speech is one of this country's most highly prized freedoms, and the Supreme Court has stated in no uncertain terms that preventing violence is the only valid reason for squelching that right. Paragraphs 45 and 47 will be stricken because the facts as alleged do not provide the factual basis to infringe the freedom of speech as required by *Milk Wagon Drivers*.

Paragraph 57[34] does not contain an allegation regarding the length of time that passed between the threats and incitation and the physical assault that occurred. In light most favorable to the Plaintiffs, the court cannot strike the paragraph.

Paragraph 58 contains a direct link between speech and an unprotected violent "lock and block," and therefore will not be

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[33] Paragraph 45 provides:

> In April, 1986, Scheidler traveled to Delaware to organize and train persons to use his methods for shutting down clinics such as DWHO and to galvanize them into action.

Paragraph 47 provides:

> On April 12, 1986, Scheidler threatened that anti-abortionists "will get rid of [clinics such as DWHO]. I proclaim that Delaware is going to become the first state in the union to be free of abortion activities.

[34] Paragraph 57 provides:

> In December 1987, after numerous threats by Scheidler that he would close a Chicago women's health center and after incitation by Scheidler to give that clinic "a hard time" and to "molest" it, co-conspirator Anthony Lesniewski physically assaulted a security guard at the American Women's Health Center by attempting to run him over with a vehicle.

stricken. Paragraph 87N (see *supra* at 67) contains no non-speech allegations and therefore will be stricken in its entirety. The phrase "by encouraging, organizing, and inciting" will be stricken from paragraph 87O. The phrase "by encouraging and inciting members of the enterprise to 'treat abortion like murder,' in the context of actual murder and attempted murder of doctors who perform abortion" will be stricken from paragraph 87Q.

V. Constitutionality of RICO

The final constitutional question that is at issue in this case is the facial constitutionality of RICO. The Scheidler Defendants challenge both statutes based on overbreadth and vagueness.

A. Vagueness

The Scheidler Defendants' vagueness argument points briefly to four aspects of RICO which could be the seed for this court to find that the statute is void for vagueness: (1) defining the "pattern;" (2) the scope of the "enterprise;" (3) applying the conspiracy crime to the enterprise; and (4) the impossibility of determining the "precise mental state that must be proved" in being liable for agreeing to engage in the enterprise. Amazingly, the Scheidler Defendants do no more than set forth these areas of difficulty without citing a single case in support of their position. Nor do they expand their accusations beyond pointing to the "fuzziness of [RICO's] contours of coverage about their [sic] outer fringes, [and] the vagueness of its provisions." Scheidler's Memo in Support at 15.

Although Justice Scalia invited facial challenges to RICO based on vagueness in *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229, 253-56, 109 S. Ct. 2893, 2908-09, 106 L. Ed. 2d 195 (1989) (Scalia, J. concurring), the statute has been consistently upheld, despite a shower of challenges. *See, e.g., United States v. Sanders*, 962 F.2d 660, 678 (7th Cir. 1992); *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991), *cert. denied*, 500 U.S. 919, 111 S. Ct. 2019, 114 L. Ed. 2d 105 (1991); *United*

States v. Andrews, 749 F. Supp. 1517, 1519 (N.D. Ill. 1990) (Aspen, J.). More importantly, the Seventh Circuit has reaffirmed RICO's constitutionality "despite Justice Scalia's statements concerning the pattern requirements in his concurrence in H.J. Inc." *United States v. Ashman*, 979 F.2d 469, 487 (7th Cir. 1992) (citing cases).

In light of this overwhelming precedent, the only basis upon which this court could sustain a vagueness attack on the statute would be to read the Supreme Court's conclusion in this case that there is no economic motive requirement for RICO. The parties have made no such argument as somehow changing the analysis to be applied in evaluating constitutionality. Under the decided cases, there is no logical argument that might implicate *vagueness* (as opposed to overbreadth) in light of the lack of economic motive requirement. Thus, this court will follow *Ashman* and conclude that RICO is not unconstitutionally vague. Moreover, the Defendants have not outlined even the roughest thumbnail sketch of how the other three "seeds" could implicate a vagueness argument – not even a single law review article is cited supporting their position generally. Defendants apparently assume that this court will not only consider their argument, it will construct it as well. The court declines the invitation.

B. Overbreadth

The overbreadth challenge is more substantial. The overbreadth doctrine recognizes the "governmental purpose to control or prevent activities subject [to] regulation" while acknowledging that goal "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). An overbreadth challenge questions the statute facially because, given a reasonable interpretation of the scope of the statute, the statute reaches potentially protected speech. The analysis to be engaged in is "whether Congress has adopted a constitutional means in achieving its concededly legitimate [goal]." *United States v.*

Robel, 389 U.S. 258, 88 S. Ct. 419, 19 L. Ed. 2d 508 (1967) (Warren, C.J.).

An overbreadth challenge may be brought based on a party's belief that the statute is unconstitutional as enforced against it, but also on the ground that the statute's application to third persons not before the court violates the First Amendment. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798-99 & n. 17, 104 S. Ct. 2118, 2125 & n. 17, 80 L. Ed. 2d 772 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); *Adult Video Ass'n v. Barr*, 960 F.2d 781, 787 (9th Cir. 1992). For the Plaintiffs to prevail, there is no need for them to argue that the statute is unconstitutional *in this case*. Rather, the court invalidates the entire statute "on its face," so that the overbroad law becomes unenforceable until a property authorized court construes it more narrowly. Gerald Gunther, *Constitutional Law* 1191 (12th Ed.1991), *see Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). In order to strike a statute based on overbreadth, the court must find that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. at 616, 93 S. Ct. at 2918. *Broadrick* emphasized that overbreadth invalidations were generally inappropriate where the allegedly impermissible implications of the challenged statute affected "conduct" rather than "speech." *Broadrick*, 413 U.S. at 616, 93 S. Ct. at 2918. In other words, if the statute in question is largely directed toward legitimately criminal activity, and merely touches the First Amendment ever so slightly at the margin, that statute need not be stricken because the overbreadth is not "substantial."

The Supreme Court recently considered the possibility that the forfeiture provisions of RICO are overbroad in *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. 2766, 125 L. Ed. 2d 441 (1993). The *Alexander* defendants challenged RICO because, they argued, the forfeiture provisions are not limited solely to

obscene materials and the sale of such materials. *Alexander v. United States*, 509 U.S. 544, 113 S. Ct. at 2774. However, the Court recognized that this was an "unprecedented use of the overbreadth principle." *Id.* Importantly, the court stated in *dicta*:

> *But the RICO statute does not criminalize constitutionally protected speech* and therefore is materially different from the statutes at issue in our overbreadth cases. *Cf., e.g., Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 574-75, 107 S. Ct. 2568, 2572, 96 L. Ed. 2d 500 (1987).
>
> Petitioner's real complaint is not that the RICO statute is overbroad, but that applying RICO's forfeiture provisions to businesses dealing in expressive materials may have an improper "chilling" effect on free expression by deterring others from engaging in protected speech.

Alexander v. United States, 509 U.S. at ---, 113 S. Ct. at 2774 [Emphasis added]. The Court concluded that the chilling effect of forfeiting protected materials is no greater than the chilling effect of a prison term, or a large fine. *Id.* Although Defendants' brief is woefully devoid of an articulation of *why* RICO is overbroad, this court will attempt to anticipate their argument so it may be addressed here.[35] This court believes that

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[35] It seems clear that Defendants do not care how this court decides on these constitutional issues, given the lack of attention they gave their briefing of them. Defendants simply want this court to rule so they may reach the Court of Appeals and the Supreme Court on these issues. This court assumes that the Defendants will brief the issues with greater attention to detail at higher levels. However, the Defendants are reminded that they may appeal only those issues which were properly decided by this court; they may not raise new arguments at the appellate level that were not raised here. *U.S. Equal Employment Opportunity Comm'n v. AIC Security Investigations, Ltd.*, 55 F.3d 1276, 1282 n. 11 (7th Cir. 1995) (citing *Citizens Ins. Co. v. Barton*, 39 F.3d 826, 828 (7th Cir. 1994)). Defendants have done themselves a great disservice by not adequately briefing these issues because they will be bound on what they may appeal by what this court decides.

Defendants wish to make a "chilling" argument similar to that raised in *Alexander* regarding freedom of association. Defendants argue that allowing RICO to be used in this context threatens "others engaged in a variety of First Amendment activity." This court interprets that statement to mean that the freedom to associate with groups who engage in protected free speech activity as well as illegal acts is "chilled" by the threat of RICO prosecution. However, Defendants miss the point of *Alexander*'s *dicta* quoted above: there will be no threat of prosecution if there is no illegal activity committed on the part of the individual defendant. RICO, standing alone, does not criminalize or chill speech, period. Speech is not implicated by the statute one iota. To be sure, if the individual defendant engages in illegal activity in furtherance of the purpose of the organization, that activity is in no way immunized by either the fact that the defendant also spoke out in support of his cause, nor by the fact that the defendant is a member of an organization who supports, encourages, or advocates the illegal activity. As noted above, support, encouragement, and even "incitement" is not criminal unless the illegal activity so closely follows the speech in question that the speaker may be thought of as the "cause" of the illegality. But RICO itself has nothing to do with that conclusion. RICO is not overbroad.

Finally, this court declines to address Defendant's argument that RICO is unconstitutional because it does not require a showing of "specific intent" to violate the statute. Specific intent is required to show a violation of a criminal statute. *Scales v. United States*, 367 U.S. 203, 221 n. 11, 81 S. Ct. 1469, 1482 n. 11, 6 L. Ed. 2d 782 (1961). Although RICO may be used criminally, this is a civil case. As such, the issue of specific intent is not relevant. Defendants, in their brief, attempt to confuse the issue by blending in the overbreadth analysis with their argument regarding specific intent. However, overbreadth analysis, and its accompanying relaxation of the standing requirement, is unique to First Amendment issues. There is no such relaxation of the standing requirement for consideration of other constitutional challenges. Defendants do not have

standing to challenge the absence of a "mens rea" requirement here. *Scales*, *Alexander*.

VI. Conclusion

For the reasons stated in this memorandum opinion, IT IS HEREBY ORDERED THAT:

1. Defendant Conrad Wojnar is DISMISSED from this action;

2. Defendant Vital-Med is DISMISSED from this action;

3. Paragraphs 29, 30, 33, 45, 47, and 87N of the Third Amended Complaint are STRICKEN;

4. The phrase "encouraging others to participate in" is STRICKEN from paragraph 28; the phrase "by encouraging, organizing, and inciting" is STRICKEN from paragraph 87O; the phrase "by encouraging and inciting members of the enterprise to 'treat abortion like murder,' in the context of actual murder and attempted murder of doctors who perform abortion" is STRICKEN from paragraph 87Q.

The court also concludes that RICO is facially constitutional as analyzed under both vagueness and overbreadth standards.

APPENDIX E

United States District Court, N.D. Illinois.

NATIONAL ORGANIZATION FOR WOMEN, INC., and its women members and other women who use or may use the services of women's health centers that provide abortions; Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., on behalf of themselves and all other similarly-situated clinics, Plaintiff,

v.

Joseph M. SCHEIDLER; Andrew Scholberg; Timothy Murphy; Pro-Life Action League, Inc.; and Operation Rescue, Defendant.

No. 86 C 7888.
July 28, 1999.

MEMORANDUM OPINION AND ORDER

COAR, J.

Before this court are various post-trial motions filed by both the defendants Joseph Scheidler and Operation Rescue ("defendants") and the two plaintiff classes represented by the National Organization for Women ("NOW") and two reproductive health clinics, Delaware Women's Health Organization, Inc. ("DWHO") and Summit Women's Health Organization ("Summit") (together, as "plaintiffs"). Defendant filed a motion to decertify the class of NOW members and non-members as well as decertify the class of clinics. The plaintiffs filed a motion to amend the complaint to conform to the evidence as well as a motion for Phase II damage trials. Plaintiffs also filed a petition for injunctive relief. Defendants' motion for decertification of the two classes is DENIED. Plaintiffs' motion to amend the complaint to conform to

evidence is DENIED. Plaintiffs' motion for Phase II damage trials is DENIED. The court GRANTS the plaintiffs' petition for a permanent injunction against defendants for a period of twelve years. All other motions are denied as moot.

Background

After thirteen years, this long and controversial case is entering one of its final stages. This case consists of a plaintiff class of reproductive health clinics and a class of potential women patients who brought claims arising under § 1962 of the Racketeer Influenced and Corrupt Organizations Act ("civil RICO") against the defendants, a group of anti-abortion protestors. After a lengthy trial that occurred from March 4, 1998 through April 14, 1998, the jury returned a verdict for the plaintiffs on these civil RICO claims. While the procedural history of this case is recounted in detail in previous opinions,[1] the evidence presented at trial must be reviewed in order to understand the post-trial motions before this court.

At the trial, evidence spanning a period of twelve years of various incidents at reproductive health clinics was presented. This evidence included incidents across the entire United States: Chicago, Illinois; Wichita, Kansas; Cherry Hill, New Jersey; New York, New York; Farmington, Michigan; Jackson, Mississippi; Dobbs Ferry, New York; Fargo, North Dakota; Wilmington, Delaware; Atlanta, Georgia; San Antonio, Texas, to name a few. Several of these events were videotaped and showed defendant protestors chaining themselves to clinic doors and surrounding patients to block their path to the clinic entrances. Over the weeks of the trial, witnesses testified to the various acts of the defendants and others. A select few are described below:

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[1] See generally *NOW v. Scheidler*, 510 U.S. 249 (1994); *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992), cert. granted, 508 U.S. 971 (1993); *NOW v. Scheidler*, 1997 WL 610782 (N.D. Ill. 1997); *NOW v. Scheidler*, 897 F. Supp. 1047 (N.D. Ill. 1995); *NOW v. Scheidler*, 1995 WL 592228 (N.D. Ill. 1995).

-In Washington, D.C., busloads of protestors rushed the doors of a clinic, pressing the bodies of clinic staff members and volunteers against the clinic entrance as they screamed they were being crushed. As one witness testified, "several of us started yelling as loud as we could, 'please stop pushing. We're going to get hurt." (Transcripts, p. 1008).

-In Milwaukee, Wisconsin, protestors repeatedly banged on the car of a patient as she entered a health clinic parking lot, and grabbed at her arms and legs as she attempted to enter the clinic. "They surrounded me and my car. Telling me I wasn't a Christian, a baby killer. That I'm going to go to hell for this. Shoving pamphlets in my hand. Trying to stop me from making my way to the door of the building." (Transcripts, p.1916). The patient was visiting the clinic to receive her pap smear results and to receive her contraceptive medication.

-In Wilmington, Delaware, protestors forcibly entered a clinic and wreaked havoc. These protesters destroyed medical equipment, entered operating rooms where clinic staff and patients were engaged in appointments, tore down cabinets, destroyed medication and medical equipment, and chained themselves to medical and operating room tables. (Transcripts, p. 663).

-In Chico, California, a clinic administrator and two clinic escorts were physically smashed up against the entrance doors of a clinic by hundreds of protestors for four and a half hours. When the clinic administrator told the protestors that she was scared and was being crushed, she heard protestors shout, "Don't pay any attention to them. They're murderers. They're baby killers. Whatever happens to them is God's will." (Transcripts, p. 1445). The glass entrance to the clinic was shattered and the clinic administrator received bruises on her legs and arms from the event.

-In Los Angeles, California, a patient who was visiting a health clinic was assaulted by protestors. The patient had an appointment at the clinic for follow-up after a surgery to repair

and restore her reproductive organs. However, she was confronted by the defendant protestors before she could enter the clinic:

> "All of a sudden, a crowd of people came running from both sides of the building towards the parking lot, towards us . . . They were shouting 'murderer, baby murderer.'. . somebody grabbed me by the back of my hair, and I fell up against the car. Then I just saw all of these people, and they were grabbing their arms and grabbing at me. I didn't know what was happening, and I was yelling for [my friend] to help me. Then [my friend] was pushing the people away, and they were fighting . . . I remember rolling down the side of the car, and the people were hitting me. Then I remember looking up to call out to ask God to help me. As I looked up and yelled 'oh, God help me,' a man hit me in the head with a big old sign. It was at this point that I grabbed [my friend's] arm and [he] grabbed me, and I put my arms around [his] waist. Then [he] was pushing the people away, and they were still grabbing and pulling at me. Then I felt myself going down, and I got scared, real scared. It was just so many people, and they were fighting and grabbing at me, and they were yelling thing like 'murderer.' I wondered, who did I kill? Who did I hurt?" (Transcripts, p. 1519).

> The patient lost consciousness as she began to bleed from her abdomen for protestors had caused her surgical incision to be torn open. Protestors rocked and beat her car as clinic personnel rushed the patient to the trauma unit of a nearby hospital. (Transcripts, pp. 1520-1522).

These are just a few examples of the incidents presented to the jury throughout this trial. Repeatedly, witnesses testified to the fear and intimidation they felt from the actions of protestors. One clinic volunteer testified, "They were . . . shoving and elbowing and smashing. I mean, they were right within less than an inch of us . . . [Y]ou know, you start sweating. You're scared. Your heart's pounding." (Transcripts, p. 1444). A

patient recounted, "I was hysterical. I was afraid. I thought they were going to kill me." (Transcript, p. 1522). A clinic administrator reflected, "I was concerned about the injury to our staff and to our patients, not only the physical injury of the building itself and the equipment but also the emotional injury and distress to our patients and to our staff, who were terrified . . ." (Transcripts, p. 663).

These incidents were connected to the organizational efforts of the Pro-Life Action Network (PLAN) and Operation Rescue (OR) and the leadership of these organizations through Joseph Scheidler and other named defendants. PLAN was founded in 1984 to bring anti-abortion activists together to coordinate their activities across the United States. Scheidler and the founding members of PLAN believed that the lobbying and legislative efforts of other anti-abortion organizations, such as the National Right to Life, were not effective. (Transcripts, p. 3936). PLAN founding members believed in more "aggressive tactics," such as blocking clinic doors with their bodies and other objects in order to stop clinic patients and staff from entering the clinic, a tactic called "rescues." (Transcripts, pp. 3936-37). Scheidler, John Ryan, and Andrew Scholberg laid the initial ground work for PLAN.

The first meeting of PLAN occurred in Ft. Lauderdale, Florida in 1984. Over 600 activists attended, with Scheidler acting as the chair of the meeting. (Transcripts, pp. 3974, 4124). At that meeting, the "Leadership Council" was created with a geographic distribution to cover the entire United States. (Transcripts, p. 3990). PLAN began its initial fundraising efforts, promoting itself as an organization with over 2000 members with a network of regional directors to coordinate "rescue" activities. (Transcripts, pp. 3977-79). Eventually, PLAN created paid positions for a Director and an Associate Director, as well as paid for the travel expenses of the Leadership Council to various "rescues," or protests, across the country. (Transcripts, pp. 4098-99, 4255).

In 1987, at a PLAN Leadership Council meeting in Washington, D.C., Operation Rescue ("OR") was born. (Transcripts, p. 4085). The stated purpose of OR was to be "to overwhelm the law enforcement system and gain free access to the clinics without legal consequences." (Transcripts, p. 4091). The PLAN Leadership Council gave approval for the formation of OR, and to Randall Terry as its director, and agreed to OR's first field training, in Cherry Hill, New Jersey. (Transcripts, p. 4088). PLAN and OR began to act as joint organizations, where Randall Terry sat on the board of PLAN, Scheidler sat on the board of OR, and the two organizations began joint fundraising efforts. (Transcripts, pp. 4087, 4226, 4253).

The stated purpose of both PLAN and OR was "to put clinics out of business." (Transcripts, pp. 4149). In particular, these two groups were to work "behind the scenes" of the anti-abortion movement and use aggressive tactics, such as "rescues" and massive demonstrations. (Transcripts, pp. 4091, 4124). PLAN and OR achieved these goal in various ways. To communicate to PLAN members, Scheidler had a daily "hotline" for members to call, where times and locations of protests were announced. (Transcripts, pp. 3949, 4128). PLAN also issued a regular newsletter, promoting future protest events as well as reporting the results of various organized PLAN activities. (*Id.*). Scheidler himself also gave "advice" to PLAN members through the hotline and newsletters, as well as through PLAN speaking events. For example, Scheidler instructed PLAN members to "case out" clinics to learn their layout and make clinic staff know that they were "vulnerable." (Transcripts, p. 3930). Scheidler also advised members, when at protests, to not obey orders of clinic personnel. When he visited local PLAN groups, Scheidler insisted that at least some of the members enter the clinic facility when they were engaged in a protest. (Transcripts, p. 3932). Through the use of PLAN newsletters, speaking events, and conventions, PLAN leadership supported illegal tactics, such as physically entering clinics and blocking procedure rooms. (Transcripts, p. 3941). In fact, Scheidler took pride in the fact that PLAN created the "lock and

block," where protestors physically lock their bodies to the doors of clinics or other large objects in front of clinic doors. (Transcripts, p. 4124).

The most significant organizing tool for defendants was the annual PLAN convention, was held in different cities across the country. Evidence was presented about the PLAN convention, and the resulting activities, for each year from 1985 until 1997. Only a select number of these conventions will be highlighted here.[2] For example, in 1985, at the PLAN convention in Appleton, Wisconsin, PLAN members agreed to create "a year of pain and fear in the abortion industry." (Transcripts, p. 4006). One step towards that goal was a planned "Christmas Truce," where PLAN members were to return to their home communities and write the reproductive health clinics in their area to inform them that during month of December they would have to "close or be closed" by protesters blocking their doors. (Transcripts, p. 4007). In Chicago, PLAN sent these letters to every single reproductive health clinic that provided abortions in the area. (*Id.*).

In 1989, at the PLAN conference in Livonia, Michigan, PLAN members organized clinic protests to occur in Farmington, Michigan during the conference. (Transcripts, p. 4108). Several hundred protestors closed the clinic in Farmington and the "success" of the protests was reported in the PLAN newsletter. (Transcripts, pp. 4109-12). In 1991, clinic protests occurred for weeks in Wichita, Kansas shortly after the

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[2] Each year the PLAN conference occurred, PLAN organized protests closed the clinics in that area. In Chicago in 1988, PLAN conducted workshop trainings on "lock and block" that were used in Chicago that year. (Transcripts, p. 4100). In Jackson, Mississippi in 1990, three clinics were closed by protestors during the PLAN conference. (Transcripts, pp. 4114-19, 4255). In San Antonio, Texas in 1992, clinics in the area were closed daily by protestors while the PLAN convention occurred. (Transcripts, pp. 4130-31). All of these protests were reported on Scheidler's Hotline and in the PLAN newsletter, praising the involvement of PLAN members, after they occurred. (Transcripts, pp. 4101, 4255, 4131).

PLAN convention held there. (Transcripts, p. 4122). PLAN leadership were significantly involved in the planning and execution of these protests. (Transcripts, pp. 4258-59).

PLAN created a successful design for the organizing of these protests. First, the protest would be announced on Scheidler's Hotline and communicated through PLAN members. PLAN leadership usually visit the site of the protest before it occurred. After the protest and clinic closing occurred, the results would be reported in the PLAN newsletter. For example, in Wilmington, Delaware in April of 1986, Scheidler entered, without permission, a reproductive health clinic with three other PLAN members and stated he was "casing the place." Even though he was asked to leave, he roamed throughout the clinic. (Transcripts, pp. 4036- 39). The next day, a protest occurred and PLAN members entered the clinic and caused considerable property damage by destroying equipment. (Transcripts, p. 633). PLAN reported this protest in its newsletter and other public relations materials and described it as a "fun time." (Transcripts, p. 4039). This same pattern occurred in Pensacola, Florida in March of that same year. (Transcripts, p. 3914). Members of the PLAN Leadership Council met in Pensacola and discussed how an "invasion" of this particular clinic could be orchestrated. It was agreed that some members would enter the waiting room of the clinic and others would enter the clinic through the back door. (Transcripts, p. 4012). The next day, the clinic was invaded by protesters, who "trashed the place," causing serious damage to surgical equipment and other medical supplies. The protesters were arrested. (Transcripts, pp. 4013-25). PLAN continued to use this same pattern of organizing, communication, and protest to close clinics throughout the country, as seen in New York City in 1988; Chicago in 1984, 1989, and 1996; Houston, Texas in 1990; and Dobbs Ferry, New York in 1991. (Transcripts, pp. 3996, 4095, 4113-14, 4119, 4190, 4256). The jury heard evidence tending to show that the objectives of the defendants at various protests included peaceful protest, informational picketing and leafleting, and acts of passive resistance in

combination with intimidation (including violence and threats of violence) to stop abortions.

After reviewing the evidence, the jury returned a verdict for the plaintiffs on their civil RICO claims. In particular, the jury found 21 acts or threats involving extortion against patients, prospective patients, doctors, nurses, and/or clinic employees in violation of federal law, 25 in violation of state law, and four acts or threats of physical violence to persons or property. Defendants were found liable for $54,471.28 in monetary damages to Summit Women's Health Organization and for $31,455.64 in monetary damages to Delaware Women's Health Organization.

Since the trial was completed, both defendants and plaintiffs have filed various motions as steps towards bringing this case to its conclusion. In order to expedite this process, this court held a hearing on the issue of injunctive relief in July of 1998. This court now addresses all remaining motions in this case.

Analysis

I. Decertification of the Classes

A. Decertification of NOW

Defendants argue that NOW should be decertified as the class representative for NOW members and non-NOW members because NOW lacks standing as an association. Citing *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), the Defendants argue that the testimony of four anonymous female witnesses at trial showed that individual participation of NOW members and non-NOW members was required to prove their claim, thus violating the third criteria for associational standing. (Dft's Corrected Motion for Decert., pp. 5, 12-13).

This court in a previous decision in this case found that NOW had associational standing under the *Hunt* test. *NOW v. Scheidler*, 897 F. Supp. 1047, 1068-69 (N.D. Ill. 1995), citing *Hunt*, 432 U.S. at 343. In particular, the court found that NOW

met the third criteria of the *Hunt* test, i.e. that the claim and the relief do not require individual participation in the lawsuit, for NOW was only suing for injunctive relief, an appropriate form of relief for an association to seek. *NOW v. Scheidler*, 897 F. Supp. 1047, 1068- 69 (N.D. Ill. 1995), citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The court stated in that opinion:

"It may be necessary for at least some of NOW's membership to testify as to their impediments in receiving treatment at abortion clinics; however, the limited nature of this proof will not force NOW to violate Hunt's third prong." 897 F. Supp. at 1070.

The resulting testimony of the four anonymous witnesses at trial did not violate the third prong of *Hunt* test and therefore NOW maintains standing.

B. Decertification of the Clinic Class: Summit and the Wisconsin litigation

Defendants argue that Summit, one of the representatives of the Clinic Class, is precluded from bringing the claims on behalf of the class because of a dismissal with prejudice of claims brought on similar facts in Wisconsin state court. (Dft's Motion for Decert., p .3; Dft's Corrected Memo in Support of Decert., p. 4 fn.8). Therefore, the Defendants argue, under Wisconsin law and the full faith and credit clause, 28 U.S.C. § 1738, Summit is subject to claim preclusion.[3]

On August 25, 1997, Summit (under the auspices of the National Women's Health Organization of Summit, Inc.), along

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[3] The Defendants argue that DWHO is also precluded because DWHO is in privity with Summit. However, there is no mention of DWHO, a Delaware-based clinic, anywhere in the papers of the Wisconsin case, nor have the Defendants present any evidence connecting DWHO to Summit. Therefore, the court will only consider the Defendants' claim preclusion arguments as they apply to Summit. After the trial was over and the instant motions were briefed, the Scheidler defendants sought to reopen the record, presumably to attempt to demonstrate "privity." That request was denied as untimely.

with the Milwaukee Women's Medical Services and Planned Parenthood of Wisconsin, filed state claims alleging invasion of privacy, assault, and public and private nuisance by Joseph Scheidler, PLAN, and other defendants in the present case, and demanded temporary and permanent injunctive relief, as well as compensatory and punitive damages. (Dft's App. to Post-Trial Motions, Vol. I, Ex. A). On September 22, 1997, an Amended Complaint was filed that did not include Summit as a plaintiff nor Joseph Scheidler nor PLAN as defendants. (Dft's App. to Post-Trial Motions, Vol. I, Ex. L). Counsel for Summit and Scheidler signed a stipulation and order for dismissal on December 1, 1997, that stated that the claims were dismissed with prejudice and a final order for dismissal was signed by Wisconsin Circuit Court Judge Charles Kahn. (Dft's App. to Post-Trial Motions, Vol. I, Ex. R). However, on February 24, 1998, just three days before the present case was to go to trial, Summit presented a motion to the Wisconsin Circuit Court to reopen and modify the stipulation and order for dismissal. (Dft's Appl to Post-Trial Motions, Vol. I., Ex. T). In response to the motion and a hearing on the matter, on February 26, 1998, Judge Kahn signed an order for dismissal that dismissed Summit's claims against Scheidler with prejudice, but with the stipulation that, "it is not the intent of this court that this order have any effect upon *National Organization for Women, Inc., et al. v. Joseph M. Scheidler, et al.*, Case No. 86 C 7888 in the United States District Court for the Northern District of Illinois, Eastern District." (Dft's Appl. to Post- Trial Motions, Vol. I., Ex. BB). On May 4, 1999, the Wisconsin Appellate Court reversed Judge Kahn's order and the cause has been remanded. *Milwaukee Women's Medical Service, Inc. v. Joseph Scheidler et al.*, No. 98-1139-FT, May 4, 1999 (Dft's Motion for Leave to Add to the Record, Attachment A).

Res judicata is an affirmative defense that must be raised or lost and the burden of establishing preclusion is upon the party claiming it. Fed. R. Civ. P. 8(c); Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §§ 4404, 4405. Counsel for Scheidler did not properly raise the defense prior to

trial. The original dismissal in the Wisconsin case was filed December 1, 1997. However, in the over 500 pages Defendants filed in February, 1998 with the Final Pretrial Order, the Wisconsin litigation was never mentioned. Counsel for Scheidler did not inform the court of the Wisconsin litigation and its dismissal until February 19, 1998, in Defendant's Motion for Continuance of All or Part of the Final Pretrial Conference or Trial. (Dft's Mot. for Cont., p. 14). In that motion, counsel for Defendant only states that claims filed by Summit against Scheidler in Wisconsin Circuit Court were dismissed with prejudice. (*Id.*). However, the counsel for Defendant never informed or even stated to this court what the Wisconsin state claims were. At the Final Pretrial Conference, Counsel for Defendant mentioned the litigation in Wisconsin again, but only as a support for his argument for continuance of the Final Pretrial Conference and not as an argument for res judicata. (Final Pretrial Conference Transcripts, February 20, 1998, pp. 10-12). When asked repeatedly and directly by the court what the Wisconsin litigation had to do with the present case, Counsel did not answer the question. (Final Pretrial Conference Transcripts, February 20, 1998, pp. 9-16). The court clearly stated to counsel that if he was requesting an order, he should submit it to the court in writing.[4] Neither before nor during trial did Counsel ever submit to this court any coherent statement of the position now asserted nor proffer any orders from the Wisconsin Circuit Court stating that there was a final judgment in that case. Therefore, the defendants did not timely raise the affirmative defense of res judicata and the defense is now lost.

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[4] After continuous questioning of counsel, the court stated, "Mr. Brejcha, I have urged you since my involvement in this case not to mention matters to this court. That if you have something that you think is sufficiently important that affects the proceedings in this court, to put it in writing. The Federal Rules of Civil Procedure make it quite clear that a request for an order must be in writing except if the request is made during a hearing. So mentioning things in passing in court is of no particular moment." (Final Pretrial Conference Transcripts, February 20, 1998, pp. 15-16).

Even if Counsel for Defendant had timely raised the res judicata defense before trial, Summit would not have been precluded from litigating these claims in federal court, for Judge Kahn of the Wisconsin Circuit Court ordered in his stipulation that the order for dismissal was not intended to affect the present case. (Dft's App. to Post-Trial Motions, Vol. I., Ex. BB). The most this court would have done is stayed the proceedings until the appeal of the Wisconsin state court judgment had been decided.[5] *Rogers v. Desiderio*, 58 F.3d 299, 302 (7th Cir. 1995) (finding that when a state court decision that could have claim preclusive effects on a federal case is appealed, the federal court should stay proceedings until the state case has reached a conclusion). When a state court has reached a final judgment that would have claim preclusive effects over pending federal litigation, the federal court must respect that judgment. *Majeske v. Fraternal Order of Police, Local Lodge No. 7*, 94 F.3d 307, 312 (7th Cir. 1996). The Full Faith and Credit Act provides in part that the "judicial proceedings" of any state "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such state." 28 U.S.C. § 1738. The Act "thus directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Electric Industrial Co. v. Epstein*, 116 S. Ct. 873, 877 (1996), quoting *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 481-82 (1982). Federal courts must accept that state's rules for determining the effect of the judgment. *Matsushita Electric*, 116 S. Ct. at 877.

Wisconsin has adopted a transactional approach to determining claim preclusion which extinguishes "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected

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[5] However, it is unclear from the papers submitted by Defendants if the Wisconsin trial court dismissal and stipulation was appealed before or after the trial in this present case.

transactions, out of which the action arose." *Northern States Power Co. v. Bugher*, 525 N.W.2d 723, 728-9 (1995), citing Restatement (Second) of Judgments § 24 (1982). However, under Wisconsin law, trial courts have broad discretion in crafting dismissals. "[A] trial court may totally accept or reject a stipulation presented by the parties for its approval." *Phone Partners Ltd. Partnership v. C.F. Communications Corp.*, 196 Wis.2d 702, 709, 542 N.W.2d 159, 161 (Ct.App.1995). Once the court approves a stipulation, it becomes the court's judgment. *Id.;* Wis. Stat. § 806.07(1). Therefore, if Defendants had raised their res judicata argument before the trial in this case, this court would have recognized the final judgment of the Wisconsin trial court and would not have found that the dismissal had a preclusive effect on the present case, since the stipulation specifically states that the dismissal has no effect on the present case. Since the trial and verdict in the present case, the Wisconsin Supreme Court has reversed and remanded Judge Kahn's dismissal and stipulation, stating that the Wisconsin trial court abused its discretion in approving the stipulation. *Milwaukee Women's Medical Services,* No. 98-1139-FT, May 4, 1999, p. 8. However, at the time that this court would have had to decide the preclusive effects of the Wisconsin case, this court would have had to respect the judgment of the Wisconsin trial court. It was not, and is not, the place of this court to go back and determine the legal validity of the Wisconsin trial court, but instead to respect the judgment of that court. *Kremer,* 456 U.S. at 482.

II. Rule 15(b): Amend Complaint to Conform to Evidence

The plaintiffs have moved under Fed. R. Civ. P. 15(b) to amend their complaint to include a claim arising under the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248(a) ("FACE"), and state law extortion, assault, trespass, and tortious interference with prospective economic advantage. (Pls' 15(b) Motion, p. 2). The plaintiffs argue that the factual issues that underlie these claims were presented at trial. In particular, the plaintiffs assert that the defendants presented several pieces of

evidence themselves that would support FACE and state law tort claims and that defendants did not object when plaintiffs presented similar evidence at trial. (Pls' 15(b) Reply, pp. 2, 4). This evidence is the same evidence that supports the predicate acts of RICO upon which the jury found the defendants liable. (Pls' 15(b) Reply, p. 5). That is, no doubt, the reason that defendants failed to object.

The defendants vigorously respond that they objected to the use of any evidence that was outside of the pleadings at trial. (Dfts' Resp. to Pls' 15(b), p. 2). Also, any evidence that they admitted that supports a FACE or a state law tort claim was admitted for another purpose. (*Id.*). Finally, the defendants argue that amending the complaint to include FACE and state law tort claims would be prejudicial to the defendants, for the jury was not instructed on FACE or state law tort claims and thus no individuals were named in the jury findings. (Dfts' Resp. to Pls' 15(b), pp. 6-7).

A. Standard for 15(b)

Rule 15(b) states in part:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in al respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; . . ."

Fed. R. Civ. P. 15(b)

Rule 15(b) creates a system in which "the complaint does not fix the plaintiff's rights but may be amended at any time to conform to the evidence." *Duckworth v. Franzen*, 78 F.2d 645, 649 (7th Cir. 1985), cert. denied, 479 U.S. 816 (1986). The Intent of Rule 15(b) is "to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties." *In re Prescott*, 805 F.2d 719, 725 (7th Cir. 1986),

quoting *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982). A Rule 15(b) amendment can occur either before, during, or after trial. Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 1491 (1990).

The key factor in determining whether an amendment should be allowed is whether the issue has been tried with the express or implied consent of the parties. *Winger v. Winger*, 82 F.3d 140, 144 (7th Cir. 1998); *Ippolito v. WNS, Inc.*, 864 F.2d 440, 456 (7th Cir. 1988); *Prescott*, 805 F.2d at 725. The test for this consent is "whether the opposing party had a fair opportunity to defend and whether he could have presented additional evidence had he known sooner the substance of the amendment." *Prescott*, 805 F.2d at 725, quoting *Hardin*, 691 F.2d at 456 (10th Cir. 1982). For an opposing party to give implied consent, the party must either have not made the objection that the evidence presented at trial was outside of the pleadings, or the opposing party must have introduced the evidence his or herself. *Prescott*, 805 F.2d at 725. Therefore, Rule 15(b) requires the opposing party to show that he or she will be prejudiced by the amendment. Wright, Miller Kane, Federal Practice and Procedure: Civil 2d § 1495 (1990). The decision as to whether the issue in the amendment was actually tried by implied or expressed consent is within the district court's discretion. *Ippolito*, 864 F.2d at 456.

While Rule 15(b) is quite liberal, that does not mean that a motion to amend a complaint will automatically be granted. "[A] court will not imply consent to try a claim merely because evidence relevant to a properly plead issue incidentally tends to establish an unpleaded claim." *Ippolito*, 864 F.2d at 456, quoting *Quillen v. International Playtex, Inc.*, 734 F.2d 1258, 1272 (7th Cir. 1984). Furthermore, if the evidence presented by the opposing party that allegedly demonstrates consent is also relevant for another purpose, then the admission of the evidence is not considered consent and the pleadings should not be amended under 15(b). Wright, Miller & Kane, § 1493 (1990); see also, *Gorlikowski v. Tolbert*, 52 F.3d 1439 (7th Cir. 1995).

Rule 15(b) also does not apply when the evidence does not support the theory upon which the court charged the jurors. *Jackson v. Crockarell*, 475 F.2d 746, 748 (6th Cir. 1973). Finally, the opposing party can defend against a 15(b) motion when the opposing party objected to the evidence during trial because it went beyond the scope of the pleadings. *Prescott*, 805 F.2d at 725.

B. Implied Consent

The plaintiffs argue that the defendants gave implied consent to the amended claims because they presented evidence themselves that supported the FACE and state law tort claims. (Pls' 15(b) Reply, p. 4). However, the court finds that the evidence to which the plaintiffs allude applies to the conspiracy claim and only incidentally to the FACE and state law tort claims. Granted, several of the defendants' witnesses testified to observing or participating in various protests in front of class clinics. However, that evidence was presented in the defense of their actions as free speech and not as an act of conspiracy. Presenting that defense does not consent to federal claims of FACE or state law tort claims. Therefore, this evidence was relevant to another issue in the case.

More troubling for the court, however, is that the evidence that plaintiffs argue supports FACE and state law tort claims does not support the theory that was presented to the jury. In order for the jury to find the defendants liable under RICO, plaintiffs had to show that PLAN demonstrated conduct of an enterprise through a pattern of racketeering activity. *NOW v. Scheidler*, 1997 WL 610782,*6 (N.D. Ill. 1997), citing *Richmond v. Nationwide Cassel, L.P.*, 52 F.3d 640, 644-47 (7th 1995). The court instructed the jury that the plaintiffs had to show that PLAN was an enterprise that affected interstate commerce and that each defendant was associated with PLAN, was involved in operating and managing PLAN, and that each defendant's participation in PLAN was through some pattern of acts illegal under RICO. (Jury Instructions).

In contrast, under FACE, an individual may have criminal or civil penalties applied to them if that individual:

> "(1) by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or any other person or any class of persons from, obtaining, or providing reproductive health services . . .
>
> (3) intentionally damages or destroys the property of a facility, or attempts to do so, because such facility provides reproductive health services . . ."

18 U.S.C. § 248(a)(1,3).

In the present case, the jury followed the verdict from and found that the defendants or other persons associated with PLAN had committed acts or threats of extortion, acts and attempts of conspiracy, acts or threats of violence, in the last ten years. (Transcript, April 20, 1998, pp. 5185-91). However, the jury did not state which defendants did these acts or when they occurred, only the total number of acts.[6] Evidence was presented at trial from before and after the enactment of FACE, so the court does not know which evidence the jury relied upon in its findings. Since individuals are not named in the jury's findings, the court does not know who was found to have the requisite intent for FACE of the state law tort claims. Since the clinic incidents from across the country were presented and the plaintiffs have not stated which state law they claim, the court

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[6] The jury found 21 acts or threats of extortion in violation of federal law; 25 acts or threats of extortion under state law; 25 attempts or conspiracy to do any of the previously mentioned acts; and 4 acts or threats of physical violence to persons or property. The jury also found that these acts occurred within the last ten years and proximately caused injury to the business and property of the two clinics and the NOW class members. None of the jury's findings was based solely on blockades of clinic doors or sit-ins within clinics. (Transcript, April 20, 1998, pp. 5183-91).

also does not know which state law to apply in the amended state law tort claims.[7] Therefore, the court finds that the plaintiffs' motion to amend the complaint to conform to the evidence is denied.[8]

Finally, as discussed later, there was some evidence presented after trial as to conduct at clinics after FACE was enacted. That evidence was offered to rebut defendants' claim that injunctive relief was unnecessary because FACE provided plaintiffs with a more focused remedy for addressing clinic blockades. That evidence was limited in nature and fails to establish a basis for the injunctive relief sought.

III. Phase II Damage Trials

In the plaintiffs' Motion in Support of Phase II Trials for Absent Class Members, the plaintiffs argue the parties agreed before trial to conduct the litigation of this case in two phases: the first phase ("Phase I") would determine if the defendants were liable under civil RICO and would feature two representative clinics for the plaintiff clinic class. Phase I of the trial was conducted in March and April of 1998 and the jury returned with a verdict in favor of the plaintiffs. The proposed second phase of the litigation ("Phase II") would be a series of damage trials at which other members of the plaintiff clinic class would have an opportunity to prove their individual monetary damages. (Pl's Motion for Phase II Reply, pp. 2-3). According to the plaintiffs, the concept of two phases of trial has ruled this case through all the stages of litigation: from discovery and the notice to class members to the final pre-trial order and the final pre-trial conference. (*Id.*). Citing the *Manual for Complex Litigation,* the plaintiffs argue that the two-phase model for complex class actions is common. *Manual for Complex Litigation,* § 33.28 at 328, 330 (3d ed.1995); see also

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[7] The issue will be addressed in more depth in the section on the damage trials.

[8] Defendants' 12(e) Motion for a More Definite Statement is denied as moot.

Hilao v. Estate of Marcos, 103 F.3d 767, 782 (9th Cir. 1996). Finally, the plaintiffs state that the defendants never objected to the bifurcation of the liability and damages issues for trial and in fact agreed to the two stages of trial at one of the pretrial conferences. (Pl's Motion for Phase II Reply, p. 5).

The answer to the question of whether to have separate trial for litigation and damages is left to the discretion of the trial court based upon the circumstances of the case before it. Fed. R. Civ. P. 42(b); *In re Bendectin*, 857 F.2d 290, 308 (6th Cir. 1988), cert. denied, 488 U.S. 1006 ("Rule 42(b) is sweeping in its terms and allows the court, in its discretion, to grant a separate trial of any kind of issue in any kind of case."); see also *Davis v. Freels*, 583 F.2d 337 (7th Cir. 1978); Wright & Miller, Federal Practice and Procedure: Civil 2d § 2388, p. 481 (1995). While separate trials for separate issues in one lawsuit is not usual in large class action suits, a two-phase model has been used to promote efficiency. See *Sterling v. Velsicol*, 855 F.2d 1188 (6th Cir. 1988); *Manual for Complex Litigation*, § 33.28. However, this model has not been used as frequently in RICO litigation, for the liability and damages questions are not so easily divided. *Manual for Complex Litigation*, §§ 33.82, 33.83, 33.86. A motion for bifurcation of the litigation is properly made at the pretrial conference. Wright & Miller, Federal Practice and Procedure: Civil 2d § 2388, p. 483 (1995); see *Krueger v. New York Telephone Co.*, 163 F.R.D. 446 (S.D.N.Y.1995).

In the present case, the plaintiffs argue that at the discovery stage they first argued for a two-phase trial. In the plaintiffs' Brief in Opposition to Defendants' Motion for Leave to File Interrogatories, the plaintiffs cited several cases that were two-phase class action litigations. See *Robertson v. National Basketball Association*, 67 F.R.D. 691, 700 (S.D.N.Y.1975); *Gardner v. Awards Marketing Corp.*, 55 F.R.D. 460, 463 (D. Utah 1972). (Pl's Motion for Phase II Reply, Ex. B). However, these cases were used in the support of the argument that defendants could not obtain discovery of absent class members

before the class was certified, not to support an argument for the bifurcation of the case. The plaintiffs did not formally present a motion for a two-phase trial before the court at that time.

The plaintiffs argue that the Notice of Class Determination, approved by this court and sent to all women's health centers in the United States who were potential plaintiff clinic class members, included language that recognized that this litigation would occur in two phases. Part F of the Notice, titled "How to Stay in the Lawsuit," states,

> "After the first phase of the trial, if Plaintiffs prevail, you may be required to provide information or even to testify in a trial or other proceeding designed to establish the amount of damages, if any, that you suffered as a result f the Defendants' acts."

(Pl's Motion for Phase II, Ex. C).

While the notice does leave open the option for a second phase of litigation, the notice in and of itself does not establish that the court ruled on the issue or that the parties consented to a two-phase trial.

In the Final Pre-Trial Order, the plaintiffs argue that a two phase trial was discussed. In the Plaintiffs' Trial Brief, the plaintiffs argued that damages for the plaintiff clinic class should be determined in a Phase II trial. (Pl's Motion for Phase II Reply, p. 4, citing Pl's Trial Brief, p. 11). Relying on General Rule 5 of the Northern District of Illinois, Standing Order on Pretrial Procedures in Civil Cases, the plaintiffs argue that the trial briefs are incorporated into the Final Pre-Trial Order and are thus binding upon the parties. (Pl's Motion for Phase II Reply, pp. 4-5). The plaintiffs state that the defendants did not object to the Final Pre-Trial Order and this two-phase model for the trial was agreed to by the defendant parties at the Final Pre-Trial Conference.[9]

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[9] The exchange relied upon by plaintiffs to demonstrate that defendants

There are several problems with the plaintiffs' argument. First, the discussion in the Plaintiffs' Trial Brief of a two phase trial was presented only as a "suggestion" to the court and consisted of only one paragraph in a fifteen page brief. The court does not consider that a formal presentation of the issue to the court. While the Plaintiffs' Trial Brief was attached to a draft of the Pre-Trial Order, the Final Pre-Trial Order that was signed and entered did not contain a copy of the Plaintiff's Trial Brief. However, within the signed and entered Final Pre-Trial Order is the statement, "6. The parties do not agree that the issues of liability and damages of the class member clinics should be bifurcated for trial." (Final Pre-Trial Order, p. 5). The plaintiffs argue that the language only refers to the two lead plaintiff clinics in the case, Summit and DWHO, but there is no additional language in the Final Pre-Trial Order to support such an argument. All language within the Final Pre-Trial Order is binding on the parties at trial. General Rule 5.00 of the Northern District of Illinois, Standing Order Establishing Pretrial Procedure, Section 6(d). Therefore, the parties did not consent to a two-phase trial.

As to the so-called agreement by defendants to a two-phase trial at the Final Pre-Trial Conference, the answer of "Right" by one of the defense counsel and the silence of other defense counsel to the comment by plaintiffs' counsel on the scope of the trial is not considered consent by this court. The court does not consider that sidebar discussion a formal presentation of the

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agreed to a two-phase trial occurred at the Final Pre-Trial Conference:

THE COURT: Now, are there any other things that we need to take up?

MS. CLAYTON: Real quick matter. I think it goes without saying that the scope of this trial is the common question of the class action and the damages of the two lead plaintiffs, and other issues of absent class members will be reserved for later. We have never actually said that, but I assume that was the scope of it.

MR. CRAIN: Right.

issue of the bifurcation of the trial to the court and the court did not rule on the issue of a two-phase trial at that time.

This court has made it very clear to all parties in this case that issues that affect the proceedings of this case must be placed in writing. (Final Pre-Trial Conference Transcripts, February 20, 1998, pp. 15-16; *supra,* fn. 2). The Federal Rules require it and the history of the proceedings in this case demanded it. The plaintiffs did not make a formal motion to bifurcate this litigation until after trial. A district court does not abuse its discretion when it denies a *sua sponte* motion for bifurcation when the parties did not make a motion for bifurcation prior to trial. *Bunch v. Bullard*, 795 F.2d 384, 390-91 (5th Cir. 1986). Therefore, the plaintiffs' motion in support of Phase II trials is denied.

IV. Injunctive Relief

A continuous issue in this case has been whether plaintiffs are able to petition for injunctive relief under civil RICO. Now that the trial is over and the monetary damages have been determined,[10] the issue of injunctive relief for the plaintiffs is the last issue to be addressed.

A. Injunctive Relief Available under RICO

Section 1964(a) of RICO, entitled "Civil Remedies," states:

> "The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to,

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[10] 18 U.S.C. § 1964(c) provides that any civil plaintiff shall recover treble damages and a reasonable attorney's fee. Therefore, the monetary damages awarded to Summit and DWHO are trebled to $163,413.84 and $94,366.92, respectively.

> prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons."

This court found in an earlier opinion in this case that private parties may petition the court for injunctive relief for civil RICO violations. *NOW v. Scheidler*, 897 F. Supp. 1047 (N.D. Ill. 1995). Granted, the circuit courts are split on this issue. *Conkling v. Turner*, 18 F.3d 1285, 1296 (5th Cir. 1994) (declining to reach the issue, but noting the split in the circuits). The Seventh Circuit also has not ruled on this issue. However, this court is persuaded by the rationale of the opinions of the other circuits. *Lincoln House, Inc. v. Dupre*, 903 F.2d 845 (1st Cir. 1990) (declining to reach the issue, but assuming that the district court could grant equitable relief); *Foxboro Co. v. Arabian American Oil Co.*, 805 F.2d 34 (1st Cir. 1986) (finding that in order to obtain injunctive relief, plaintiff must show irreparable injury, substantial likelihood of success on the merits, a weighing of the equities in the plaintiff's favor, and a public benefit); *Humana, Inc. v. Avram A. Jacobson, M.D., P.a.*, 804 F.2d 1390 (5th Cir. 1986) (same); *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982) (implying that equitable relief may be available under RICO); *Aetna Casualty & Sur. Co. v. Liebowitz*, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983) (reasoning that Congress did not intend "to deprive the district court of its traditional equitable jurisdiction" to grant injunctive relief for alleged violations of RICO statute); see also Batista, Civil RICO Practice Manual 169 (1987), § 6.13 – The Availability of Injunctive Relief. This court also must follow the Supreme Court's instruction that "RICO is to be read broadly" and that the very purpose of the statute is to "supplement and strengthen the means already available for fighting crime." *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 498 (1985).

While an injunction may be an option under civil RICO, any possible injunction must pass muster under the First Amend-

ment. The Supreme Court has noted in this very case that, "even in a case where a RICO violation has been validly established, the First Amendment may limit the relief that can be granted against an organization otherwise engaged in protected expression." 510 U.S. 249, 264 (1994) (J. Souter, concurrence). As this court examines the potential of an injunction, the court will follow the Seventh Circuit's instruction to address, "if necessary, . . . which of the defendants' activities, . . . are protected by the First Amendment to the United States Constitution." *NOW v. Scheidler*, 25 F .3d at 1053.

B. Standard for Injunctive Relief

A party seeking a permanent injunction must show that: 1) it has prevailed on the merits of its claim; 2) it has no adequate remedy under law; 3) the balance of equities tips in its favor, and 4) the issuance of the injunction serves the public interest. *Plummer v. American Institute of Certified Public Accountants*, 97 F.3d 220, 229 (7th Cir. 1996). Obviously the plaintiffs met the first criteria when the jury returned a verdict finding the defendants liable under civil RICO. (Transcripts, April 20, 1998, pp. 5183-5191). The final three criteria must be examined.

1. No Adequate Remedy Under Law

Since RICO expressly provides for injunctive relief, this factor does not apply, and thus the plaintiffs do not have to show that they lack an adequate remedy under law. When Congress expressly authorizes injunctive relief to enforce provisions of a statute, a party need not show the lack of a adequate legal remedy. *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 740 F.2d 566, 571 (7th Cir. 1984); *Pepsico, Inc. v. Redmond*, 1996 WL 3965 at *28 (N.D. Ill. 1996); *Special Education Services v. RREEF Performance Partnership-I, L.P.*, 13 A.D.D. 683 (N.D. Ill. 1995); *North Shore- Chicago Rehab. Inc. v. Village of Skokie*, 827 F. Supp. 497, 509 (N.D. Ill. 1993); *Natural Resources Defense Council, Inc. v. Outboard Marine Corp.*, 692 F. Supp. 801, 822 (N.D. Ill.

1988); *Wilk v. American Medical Association*, 671 F. Supp. 1465, 1484-85 (N.D. Ill. 1987). The Seventh Circuit has held that for a statutory injunction, "the moving party only needs to show that there is some reasonable likelihood of future violations..." *Commodity Future Trading Commission v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979). As we shall see below, there is more than adequate evidence to make this showing.

2. Balancing the Equities and Serving the Public Interest

The threatened injury to the two classes of plaintiffs outweighs the potential harm to the defendants by an injunction. The evidence presented both at trial and at the injunction hearing shows that the defendants have a history of unlawful conduct. The jury found that in the last ten years, the defendants committed repeated acts and threats of extortion against patients, prospective patients, and clinic personnel as well as acts and threats of violence to persons and property across the United States. (Transcripts, April 20, 1998, pp. 5187-88). These acts crossed the line of expression into the realm of threatening conduct. The Supreme Court has upheld injunctions against individual protestors and organizations of protestors of reproductive health clinics when there is a history of prior unlawful conduct by the protestors. *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 374 fn. 6 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 762, 764 fn. 2 (1994). The Court in *Madsen* found that there was a significant governmental interest in the injunction in order to ensure public safety and order, to promote free flow of traffic on the streets and sidewalks, to protect property rights, and to protect a woman's freedom to seek pregnancy-related services. *Madsen*, 512 U.S. at 762. Considering the evidence relied upon by the jury in this case, and the evidence presented to the court in the injunction hearing on the actions of the defendants, the governmental interests are significant enough to justify a tailored injunction.

C. The Necessity of an Injunction in light of FACE

This court held a post-trial hearing to address the issue of whether the passage of FACE has addressed the defendants' conduct and thus has eliminated the need for an injunction in the present case. FACE was passed by Congress in May of 1994. At the hearing, evidence was presented of defendants' illegal activity since the passage of FACE. For example, plaintiffs presented evidence of butyric acid being placed in a reproductive health clinic in Orlando, Florida in May of 1998 during Operation Rescue's national rescue week in Orlando as well as videotape evidence of defendants blocking clinic doors and physically accosting plaintiffs as they attempted to enter a clinic in Chicago in August of 1996. (Transcripts, June 30, 1998, pp. 45-46, 92-95). Evidence was also presented of "lock and blocks" at a clinic in Milwaukee where defendants physically locked their bodies to automobiles that were parked in front of the clinic's doors, making it impossible for clinic staff and patients to enter the clinic. (Transcripts, June 30, 1998, pp. 97-98). These "lock and blocks" have been continuing in Milwaukee on an almost weekly basis since May of 1994. (Transcripts, June 30, 1998, p. 98). Plaintiffs' witnesses testified at the hearing that various injunctions under FACE have been sought and implemented in order to address these activities, but the illegal conduct of the defendants continues as defendants cross state lines to avoid the jurisdiction of the various injunctions. (Transcripts, June 30, 1998, pp. 55, 73). Moreover, there was testimony supporting the conclusion that blitzkrieg tactics were sometimes used to swoop in on a clinic without warning so as to overwhelm available law enforcement personnel. (Transcripts, p. 4091).

This court finds that the defendants, as an enterprise, have continued to engage in illegal behavior that violates civil RICO since the passage of FACE and thus there is a significant governmental interest in ordering an injunction to enjoin such illegal conduct. The injunction should be national in scope, for plaintiffs have shown that injunctions that are geographically

limited do not prevent defendants from engaging in illegal conduct. Where the need for an injunction is nationwide, the courts have consistently held that an injunction can and should be nationwide in scope both in the abortion protest context, *United States v. Dinwiddie*, 76 F.3d 913, 929 (8th Cir. 1996); *United States v. Roach*, 947 F. Supp. 872, 878 (E.D.Pa.1996); *United States v. McMillan*, 946 F. Supp. 1254, 1270 (S.C.Miss.1995); as well as in other contexts. *United States v. Carson*, 52 F.3d 1173, 1184-85 (2d Cir. 1995); *Bresgal v. Brock*, 843 F.2d 1163, 1171 (9th Cir. 1987); *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985). The Eight Circuit in *United States v. Dinwiddie* upheld a national permanent injunction against an individual anti-abortion protestor. The court in *Dinwiddie* found that not only was there a significant governmental interest in protecting the particular clinic staff and patients involved in the case, but in protecting the staff and patients of other reproductive health facilities throughout the country from the illegal conduct of the defendant. *Dinwiddie*, 76 F.3d at 929. The court recognized that the defendant "could easily frustrate the purpose and spirit of the permanent injunction simply by stepping over state lines and engaging in similar activity at another reproductive health facility." *Id.*, quoting the district court, 885 F. Supp. 1286, 1296 (W.D.Mo.1995). Considering the evidence of defendants' illegal conduct across the United States, the reasoning of *Dinwiddie* applies squarely to this case.

D. Conduct versus Speech

The defendants argue that an injunction would be a direct ban on protected speech and thus would be unconstitutional. (Dfts' Memo in Opp. to Inj., pp. 7- 8). However, the Supreme Court has held that there is a distinction between speech and conduct. While speech is constitutionally protected, if the speech is used to threaten, incite or organize criminal acts, the speech loses its protection. *Madsen*, 512 U.S. at 773 (threats are proscribable under the First Amendment); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (speech infused with violence are

indistinguishable from physical threats); *R.A.V. v. City of St. Paul,* 505 U.S. 377, 383, 386 (1992) (fighting words are not protected by the First Amendment). See also *United States v. Wilson,* 154 F.3d 658 (7th Cir. 1998) (an illegal course of conduct is not protected by the First Amendment merely because the conduct was carried out by speech).

The injunction restrains specific behavior of defendants that the courts have held are not protected: obstructing or interfering with the access to a reproductive health facility, *Schenck*, 519 U.S. at 367 n. 3; *Madsen*, 512 U.S. 759-61; trespassing, *Id.; Portland Feminist Women's Health Center v. Advocates for Life,* 859 F.2d 681, 684 (9th Cir. 1998); *Roach*, 947 F. Supp. at 878; damaging property, *Portland Feminist*, 859 F.2d at 684; and using violence or threats of violence, *McMillan*, 946 F. Supp. at 1254. The Seventh Circuit has distinguished between conduct and speech in the arena of anti-abortion protesting: "[Physically impeding entry to a reproductive health facility] goes beyond protest and interferes with the personal liberty and property rights of others. While it is expressive conduct, it is not protected by the First Amendment." *Wilson*, 154 F.3d at 663. The injunction still leaves open many avenues for defendants to express their anti-abortion beliefs. For example, the injunction does not enjoin protected actions such as peaceful picketing, public speeches, pamphleting, praying, or sidewalk counseling.[11]

E. Prior Restraint

The defendants argue that an injunction would be a prior restraint on speech, for it would have a chilling effect upon speech. (Dft's Memo in Opp. to Inj., p. 6). However, the Supreme Court has rejected this prior restraint argument in two cases involving injunctions against anti-abortion protestors. In *Madsen,* the Court held, "[n]ot all injunctions that may incidentally affect expression, however, are 'prior restraints' in

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[11] See footnote 20, *infra*, for definition of sidewalk counseling.

the sense that the term was used in *New York Times Co. v. United States*, 403 U.S. 713 (1971) or *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980). Here, petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the . . . buffer zone." 512 U.S. at 764, fn. 2. In *Schenck*, once again the Supreme Court rejected the prior restraint argument, for the injunction left alternative channels of communication open to protestors and the injunction was issued because of the illegal conduct of the defendants, not because of the content of their expression. 519 U.S. at 374, fn. 6. The same is true in this case. The record shows systematic illegal conduct by the defendants against the classes of plaintiffs. The injunction still allows a variety of options for the defendants to express their views. This case is about political means and ends. While the political ends of the defendants-to convince the public of the need to protect what they characterize as "unborn children"-are constitutionally protected by the First Amendment, a number of their means-destroying property and threatening violence-are not.

V. The Injunction

This case has come to the Court on the request of the Certified Plaintiff Classes[12] and the members of NOW whom NOW represents for a Permanent Nationwide Injunction.

The Court having heard the evidence presented at the trial of this case from March 5, 1998 through April 14, 1998, after

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[12] The Plaintiff Class of Clinics and the Plaintiff Class of Women are defined in this Court's Order dated March 28, 1997 as follows:

The Clinic Class: The class of all women's health centers in the United States at which abortions are performed.

The NOW Non-Member Class: The class of women who are not NOW members and whose rights to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities.

which a jury ruled in Plaintiffs' favor on all issues; and having heard additional evidence, without any advisory jury, from June 30, 1998 through July 2, 1998;

The Court hereby finds and orders:

1. The Defendants[13] have violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq., by operating an enterprise, the Pro Life Action Network ("PLAN"), through a pattern of numerous, repeated acts of racketeering that interfered with the Plaintiff Clinics' right to provide medical services, including but not limited to abortions, and the right of NOW members and the Plaintiff Class of women to obtain those services.

2. The evidence presented at trial established a likelihood that similar illegal conduct would be committed in the future by the Defendants and/or others acting in concert with them.

The Conduct Enjoined

3. Defendants Joseph Scheidler, Andrew Scholberg, Timothy Murphy, Pro-Life Action League, Inc., and Operation Rescue, a/k/a Operation Rescue National (the "Defendants"), and each of their officers, directors, agents, representatives, servants, employees, attorneys and any other on their behalf or in concert with them, are hereby enjoined from directly or indirectly: [14]

a. interfering with the right of any member of the Certified Class of Plaintiff Clinics to conduct its business (including but not limited to the right to provide abortion services) or the right of any NOW member or any member of the Certified Class of

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[13] Randall A. Terry entered into a Settlement Agreement with Plaintiffs prior to trial. This Order does not apply to him.

[14] *Madsen v. Women's Health Center*, 512 U.S. 753, 775 (1994); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 859 F.2d 681, 687 (9th Cir. 1988); *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342, 1355 (3rd Cir. 1989).

women to avail herself of the Plaintiff Clinics' services (included but not limited to abortion services), by:

(1) blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of any Plaintiff Clinic[15];

(2) trespassing on the premises or the private property of any Plaintiff Clinic[16]

(3) destroying, damaging or stealing property of any Plaintiff Clinic, its employees, volunteers, or any woman who seeks to use the services of such a Clinic;[17]

(4) using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic;[18]

b. aiding, abetting, inducing, directing, or inciting any of the acts enumerated in subsection a. of this paragraph (the "Acts") through any of the Defendants or through others;[19]

c. operating an enterprise through any of the Acts described above.

4. This injunction does not prohibit or preclude expressive activities that are constitutionally protected, including but not limited to the following conduct:

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[15] *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 367 n. 3 (1997); *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 759-61 (1994).

[16] *Schenck*, 519 U.S. at 367 n. 3 (1997); *Madsen*, 512 U.S. at 759 (1994); *Portland Feminist Women's Health Center v. Advocates for Life*, 859 F.2d 681, 684 (9th Cir. 1988); *United States v. Roach*, 947 F. Supp. 872, 878 (E.D. Penn. 1996).

[17] *Portland*, 859 F.2d at 684 (9th Cir. 1988).

[18] *United States v. McMillan*, 946 F. Supp. 1254 (S.D. Miss. 1995).

[19] *Schenck*, 519 U.S. at 367 n. 3 (1997); *Madsen*, 512 U.S. at 761 (1994).

a. Peacefully carrying picket signs on the public property in front of any Plaintiff Clinic;

b. Making speeches on public property;

c. Speaking to individuals approaching the clinic;[20]

d. Handing out literature on public property; and

e. Praying on public property.[21]

5. This injunction shall bind Defendants Joseph Scheidler; Andrew Scholberg; Timothy Murphy; the Pro-Life Action League, Inc.; and Operation Rescue, a/k/a Operation Rescue National, and each of their officers, agents, servants, employees and attorneys, and all other persons in active concert with them, and who have actual or constructive notice of this Order, and any other person acting in concert with PLAN. Notice of this Order may be given to each such person by hand delivery, First Class Mail, Certified Mail, facsimile, or by reading a copy of this order aloud. Such reading may be accomplished by any representative of a Plaintiff Clinic or by any federal, state or local law enforcement personnel.

6. This injunction shall be enforceable by the U.S. Marshall Service and by any other federal, state or local law enforcement authority, each of whom is hereby authorized to arrest any person who appears to be in disobedience of this injunction. The arrestee may be taken before any federal judge or magistrate in the jurisdiction in which the arrest is made. Violation of this injunction may subject the Defendant, or any person within the scope of this injunction, to prosecution for criminal or civil contempt of court, and to the imposition of any penalties

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[20] This activity is also referred to as "sidewalk counseling." Sidewalk counseling has been defined by the Supreme Court as ". . . a conversation of a non-threatening nature by not more than two people with each person or group of persons they are seeking to counsel . . ." *Schenck*, 519 U.S. 357 (1997).

[21] *Roach*, 947 F. Supp. at 878 (E.D. Penn. 1996).

available under the law, including but not limited to incarceration or detention, the posting of a bond, monetary penalties, payment of damages to any aggrieved persons or entities, payment of reasonable attorney's fees and costs in connection with a contempt action, and other sanctions deemed appropriate by the court.[22]

Retention of Jurisdiction

7. The Court shall retain jurisdiction to enforce the terms of this injunction for twelve (12) years from the date below.

Conclusion

For the foregoing reasons, Defendants Joseph Scheidler and Operation Rescue's motion for decertification of the two classes is DENIED. Plaintiffs National Organization for Women, Delaware Women's Health Clinic, and Summit Women's Health Clinic's motion to amend the complaint to conform to evidence is DENIED. Plaintiffs' motion for Phase II damage trials is DENIED. The court GRANTS the plaintiffs' petition for a permanent injunction to be placed upon defendants for a period of twelve (12) years. All other motions are denied as moot. This case is now closed.

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[22] *United States v. Dinwiddie*, 76 F.3d 913 (8th Cir. 1996) (referring to language of injunction quoted in 885 F. Supp. 1286, 1298 (W.D. Mo. 1995)); *Roach*, 947 F. Supp. at 878 (E.D. Penn. 1996).

APPENDIX F

The Hobbs Act, 18 U.S.C. § 1951, provides in full:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.
>
> (b) As used in this section –
>
> > (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.
> >
> > (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.
> >
> > (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964, provides in relevant part:

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in

connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

APPENDIX G

[*Excerpts From Jury Instructions*]

* * * *

[Tr. 4938] This lawsuit is brought under the Racketeer Influenced and Corrupt Organizations Act called RICO and state law. The plaintiffs seek injunctive relief and damages from the defendants who allegedly have conspired among themselves and with others through their alleged enterprise, the Pro-Life Action Network or PLAN, to engage in a pattern of illegal activity, which the plaintiffs contend was designed to injure the business and property of clinics where abortions are performed and to deprive women of the right to obtain the services of those clinics.

A woman's – it says women's. It should be woman's. A woman's right to obtain an abortion is not at issue in this [Tr. 4939] lawsuit. The United States Supreme Court already has declared that women have a constitutional right to choose to have an abortion, nor is the right to engage in peaceful protest an issue in this lawsuit. The parties agree that peaceful picketing, leafletting, and participating in the legislative process are activities protected by the First Amendment of the United States Constitution.

What is at issue in this case is whether the defendants engaged in activities that are prohibited by RICO. The fact that it has taken 12 years for this case to come to trial should not concern you.

In this case you have heard testimony relating to incidents of murder, arson, and bombing. There is no claim in this case, however, that the defendants themselves are responsible for any of those acts. An issue has been raised in this case as to the relationship between Operation Rescue and Operation Rescue National. On this issue you are directed that Operation Rescue and Operation Rescue National are one in the same organization for actions taken in the following times and places:

From July 31st, 1990 through December 1993 in Washington, D.C., the summer of 1991 in Wichita, Kansas; March 1st, 1989 through December 1993 in the Philadelphia, Pennsylvania metropolitan area including Cherry Hill, New Jersey. As to other times and places the issue of the [Tr. 4940] relationship between Operation Rescue and Operation Rescue National is a question for you to decide.

Also you heard testimony from Mr. Keith Tucci denying that he ever – it says never. It should be ever – that he ever observed anyone acting on behalf of Operation Rescue National or Operation Rescue engaged in activity designed to deprive a clinic of property. You are instructed that a Court of the United States has found that Operation Rescue National, Flip Benham, Keith Tucci, Don Treshman, and Rescue America engaged in activity that did deprive a clinic of property in August of 1992 during the Republican National Convention in Houston, Texas.

In this case the plaintiffs must prove every element of their RICO claims by a preponderance of the evidence. A preponderance of the evidence simply means evidence that persuades you that the plaintiffs' claim is more likely true than not true. In deciding whether any fact has been proven by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses regardless of who may have called them and all exhibits received in evidence regardless of who may have produced them.

I will instruct you on the plaintiffs' burden of proof with respect to their state law claims when I give you the instructions on those claims. The plaintiffs have made two separate claims that the defendants engaged in activities [Tr. 4941] prohibited by RICO. The first, which I will refer to as Claim 1, is that the defendants committed acts which violate RICO. The second, which I will refer to as Claim 2, is that the defendants conspired to commit acts that would violate RICO. I will instruct you on the elements of each of these claims separately.

Claim 1 RICO violation. In order for you to find that the defendant violated RICO, the plaintiffs must prove by a preponderance of the evidence, 1, that PLAN is an enterprise; 2, that PLAN affected interstate commerce; 3, that the defendant was associated with PLAN; 4, that the defendants' association with PLAN involved operating or managing PLAN; and 5, that the defendant participated in the affairs of PLAN through some pattern of acts illegal under RICO.

I will now instruct you as to each of these elements. From here on in order to avoid repeating myself when I say defendant, that also means more than one defendant. If you find that more than one defendant committed a RICO violation, you may find that one, some, or all the defendants violated RICO. I will now instruct you on each of these elements.

The plaintiffs allege – first element, enterprise. The plaintiffs allege that the Pro-Life Action Network or PLAN is an enterprise with the common purpose of preventing [Tr. 4942] abortion and shutting down clinics that perform abortions. An enterprise is defined as a group of persons or organizations associated together formally or informally for a common purpose of engaging in a course of conduct.

An enterprise requires an ongoing structure of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchial or consentual decision making. An enterprise does not have to be a legally recognized entity such as a corporation, and it need not have a formal structure with such things as officers, employees, titles, or bank accounts. Further, it does not matter whether PLAN is organized for a lawful or unlawful purpose or whether its unlawful acts actually benefitted the group.

Second element, interstate commerce. The second element requires that PLAN engaged in or had an effect on interstate commerce. In order to establish this element the plaintiffs must prove by a preponderance of the evidence that PLAN or any of its activities affected interstate commerce. For example, if the

defendants or others associated with PLAN used the United States mail or traveled or made phone calls across state lines while doing any action connected with PLAN regardless of whether these actions were unlawful, then you must find that this element has been met.

Plaintiffs must show that the defendant was associated with PLAN. That is, the defendant must have had [Tr. 4943] some minimal association with PLAN and have known something about PLAN's activities as they relate to the illegal acts under RICO. It is not necessary that the particular defendant committed acts unlawful under RICO or was aware of all of the unlawful acts committed by other people who were associated with PLAN. If the defendant was associated with PLAN at any time during its existence, this element is met. It is not necessary that the particular defendant be associated with PLAN for the entire time that it existed.

The fourth element, operating or managing an enterprise. The plaintiffs must show that as part of his or its association with PLAN the defendant participated in the operation or management of PLAN or acted at the direction of PLAN's leaders. The defendant need not have been a part of the top management or have held any formal position in PLAN.

The fifth element, pattern of unlawful activity. Plaintiffs must show that the defendant or other people associated with PLAN committed the two or more unlawful acts in any of the following categories in any 10-year period:

1, acts or threats involving extortion against a patient, prospective patient, doctor, nurse, clinic worker, or clinic. 2, threats of murder against a doctor, nurse, or clinic worker. 3, attempting or conspiring to do any of the acts listed in paragraphs 1, 2 above even if the act was not actually carried out.

[Tr. 4944] 4, acts or threats of physical violence to any person or property. 5, travel across state lines or use of the mails or telephone with the intent to promote, manage, or carry out any act of extortion, arson, or any crimes of violence in

violation of state or federal law followed by an act in furtherance of that intent. 6, attempting to travel across state lines or use the mail or telephone to do acts described in paragraph 5 above. Or 7, causing others to travel cross state lines, use the mail or telephone to do or attempt acts described in paragraph 5 above.

The two or more acts may be from the same category or different categories. I will give you further explanation about some of these categories of unlawful acts in a moment. The plaintiffs must also show that there was some connection between the acts. For example, that they happened as a result of a common scheme, plan, or motive.

Unlawful acts under RICO. I will now instruct you on the elements of certain of the unlawful acts under RICO which the plaintiffs allege that the defendants have violated.

Federal law extortion, Hobbs Act. The plaintiffs have alleged that the defendant and others associated with PLAN committed acts that violate federal law prohibiting extortion. In order to show that extortion has been committed in violation of federal law, the plaintiffs must [Tr. 4945] show that the defendant or someone else associated with PLAN knowingly, willfully, and wrongfully used actual or threatened force, violence, or fear to cause women, clinic doctors, nurses, or other staff or the clinic themselves to give up a property right.

The term property right means anything of value, including a woman's right to seek services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services free from wrongful threats, violence, coercion, and fear. It does not matter whether or not the extortion provided an economic benefit to PLAN. Any fear involved must be reasonable under the circumstances.

Fear includes not only fear of physical violence but fear of wrongful economic injury. Exploitation of the victim's reasonable fear constitutes extortion regardless of whether or

not the defendant was responsible for creating that fear and despite the absence of any direct threats.

Plaintiffs must also show that the extortion of the defendant or others associated with PLAN affected interstate commerce. See instruction No. 19 for a definition of interstate commerce. It is sufficient if the acts of extortion were aimed at medical facilities that purchased supplies made in another state or that served patients who came from another state.

[Tr. 4946] If the defendant or someone else associated with PLAN attempted to commit such an act, it is a violation even if the act was not completed.

Definition of a threat. In order for the plaintiffs to establish a threat, they must demonstrate that the defendants or their co-conspirators made a statement or engaged in conduct in a context or under such circumstances wherein a reasonable person would foresee that the statement or conduct would be interpreted by those to whom the maker communicates the statement or conduct as a serious expression of an intention to inflict harm, including bodily harm or wrongful economic harm.

Context as used in this instruction includes the surrounding events and reaction of the listeners. Whether an action or statement is a threat is a matter for you the jury to decide. For example, you have heard evidence about physical blockades at clinics. You must decide whether the act of blockading constituted a threat. You need not find that the defendant or co-conspirator intended to carry out the threat or was even capable of carrying out the threat in order to find that the action or statement was, in fact, a threat.

State law extortion. Plaintiffs have alleged that the defendants and others associated with PLAN committed acts that violate various states' laws against extortion. In [Tr. 4947] order to show that state law extortion has been committed, the plaintiffs must show that the defendant or someone else associated with PLAN intentionally caused women, clinic

doctors, nurses, or other staff or the clinics to give up a property right.

The term property right means anything of value, including a woman's right to seek medical services from a clinic, the right of the doctors, nurses, or other clinic staff to perform their jobs, and the right of the clinics to provide medical services from wrongful threats, violence, coercion, and fear.

Plaintiffs must also show that the defendant or other persons associated with PLAN did this through the use of violence or fear including threats of personal injury, damage to property, or economic interests, or threats to commit other crimes. The threat need not have been actually carried out and the defendant need not have even actually intended to carry out the threat.

If you find that the defendant or another person associated with PLAN committed, attempted, or conspired to commit extortion in certain states, you must also find that the value of the rights involved is as follows:

In Missouri more than $150, in Kansas more than $500, and in Texas more than $1500.

State law attempted extortion. A defendant or [Tr. 4948] another person associated with PLAN committed the unlawful act of attempted extortion under state law if you find that 1, he or she intended to commit extortion; 2, he or she took a substantial step towards committing extortion; and 3, the attempt was accompanied by a threat.

Proximate cause. Finally you must consider whether there was some direct relationship between the wrongful action of the defendant or others associated with PLAN and the injury or harm to plaintiffs' business or property rights, which includes a woman's right to seek medical services from a clinic, the right of doctors, nurses, and other clinic staff to perform their jobs, and the right of the clinics to provide medical services.

An injury or harm is proximately caused when an act plays a substantial part in bringing about or actually causing the injury

or harm. In determining whether actions of defendant or someone else associated with PLAN proximately caused the injury or harm to the plaintiffs, you may consider the various unlawful acts under RICO discussed above and any overt act taken in furtherance of PLAN's goals.

Threat of murder. Although plaintiffs do not allege that the defendants committed murder, they do allege that the defendants and others associated with PLAN have threatened murder against doctors and clinic staff members. Murder is the killing of a human being if it was done 1, intentionally [Tr. 4949] and with premeditation; or 2, unintentionally but recklessly under circumstances showing extreme indifference to the value of human life.

The defendants' liability for acts of others. Liability may not be imposed upon any defendant merely because that defendant belonged to a group, some members of which committed acts of violence. In order to find the defendants liable, you must conclude that the enterprise or those acting on behalf of the enterprise directly or indirectly authorized or ratified unlawful activities and that the defendants held a specific intent to further those illegal objectives.

Claim 2, RICO conspiracy. Plaintiffs have also alleged that each defendant engaged in a conspiracy to violate RICO. This means that a defendant agreed with one or more other persons that defendants or others associated with PLAN would engage in acts that violate RICO. A person may be liable for conspiring to violate RICO even if you find that the conspiracy was not successful and no unlawful acts were actually committed.

If you have found all the defendants liable under Claim 1, then you need not consider this second claim. However, if you have found any defendant not liable under Claim 1, then you should consider whether that defendant agreed with any other person or organization to violate RICO.

[Tr. 4950] Agreement. To prove liability for conspiring to violate RICO, the plaintiffs must prove that the defendant

knowingly became associated with PLAN and agreed with another person to operate and manage PLAN through a pattern of racketeering activity. You do not need to find that the defendant agreed to personally commit unlawful acts under RICO. People or groups who are associated with the RICO enterprise may agree to divide up the work, and each person who agrees to operate or manage an enterprise through a pattern of unlawful acts under RICO may be liable even if he intended that someone associated with the enterprise would carry out the unlawful acts.

Once a defendant agrees with a co-conspirator that PLAN would engage in RICO violations, that defendants is responsible for the previous acts of the conspiracy as well.

Multiple conspiracies. You must determine whether a single conspiracy existed between two or more conspirators. If you find that no such conspiracy existed, then you must return a verdict in favor of the defendants on this count. Proof of several separate conspiracies does not prove that a single overall conspiracy existed. While the parties to the agreement must know of each other's existence, they need not know each others' identity nor need there be direct contact.

The agreement may continue for a long period of time and include the performance of many transactions. New [Tr. 4951] parties may join the agreement at any time, while others may terminate their relationship. The parties are not always identical, but this does not mean that there are separate conspiracies. The distinction must be made between separate conspiracies, where certain parties are common to all and one overall continuing conspiracy with various parties joining and terminating their relationship at different times.

Various people knowingly joining together in furtherance of a common design or purpose constitute a single conspiracy. While the conspiracy may have a small group of core conspirators, other parties who knowingly participate with those co-conspirators and others to achieve a common goal may be

members of an overall conspiracy. In essence, the question is what is the nature of the agreement. If there is one overall agreement among the various parties to perform different functions in order to carry out the objectives of the conspiracy, the agreement among all the parties constitutes a single conspiracy.

If you decide that such a conspiracy did exist, you must determine whether the defendants were members of that conspiracy. If you should find that a particular defendant was a member of some other conspiracy but not the one alleged, then you must return a verdict in favor of that defendant.

The First Amendment. The First Amendment to the [Tr. 4952] Constitution permits persons to join with others to express a particular viewpoint. In public debate, speech including conduct is protected by the First Amendment. This may be so even if the speech is uninvited and unwelcome by the person to whom it is directed or to others within earshot. The First Amendment even protects speech that is insulting or even outrageous.

You have heard evidence of speeches made by some of the defendants and have read some of their writings. Some of those speeches and writings contain strong and emotional language. Mere advocacy of the use of force and violence may not be the basis for finding defendants liable for having made the speech or authored the writing unless the words used may be used to incite imminent unlawful conduct that, in fact, followed within a reasonable period.

Speeches and writings may be taken, however, as evidence that the defendants or the enterprise gave other specific instructions to carry out violent acts or threats.

Threats to patients, owners or operators of clinics, clinic staff including doctors and those assisting patients, owners, operators, or clinics or staff are not protected by the First Amendment. Physical attacks on patients, owners, operators of clinics, or clinic staff are not protected by the First Amendment.

Destruction of property is not protected by the First Amendment. The protection of the [Tr. 4953] First Amendment does not extend to joining together to deprive others of their lawful rights.

Damages. In considering the issue of damages, if any, with respect to the RICO claim you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just, and reasonable compensation for all of the damages to the plaintiff and its business or property, no more and no less. Damages may not be based on speculation because it is only actual damages, what the law calls compensatory damages that you are to determine.

You should consider the amount of damages, if any, with respect to each claim separate and independent from the amount of damages, if any, with respect to other claims. For example, and by way of example only, if you determine that damages should be awarded to a plaintiff under his RICO claim, you should award full, just, and reasonable compensation for damages under the RICO claim without regard to the damages, if any, you might award under any other claim.

Damages for personal injury such as pain and suffering, emotional suffering, humiliation, and mental anguish are not recoverable under RICO. You should not award damages for any personal injuries or harm derived from personal injuries.

[Tr. 4954] During the trial of this case ceratin testimony has been presented to you by way of deposition consisting of sworn recorded answers to questions asked of a witness in advance of trial by one or more of the attorneys for the parties to the case. The testimony of the witness who for some reason cannot be present to testify from the witness stand may be presented in writing under oath. Such testimony is entitled to the same consideration and is to be judged as to credibility, weighed, and otherwise considered by the jury insofar as possible in the same way as if the witness had been present and had testified from the witness stand. All persons are equal before the law.

This case should be considered and decided by you as an action between persons of equal standing in the community of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations stand equal before the law and are to be dealt with as equals in a court of justice.

Although there are more than one plaintiff in this action, it does not follow from that fact alone that if one is entitled to recover all are entitled to recover. The defendants are entitled to a fair consideration of their defense as to each plaintiff, just as each plaintiff is [Tr. 4955] entitled to a fair consideration of its claim against each defendant. Unless otherwise stated, all instructions given you govern the case as to each plaintiff.

Multiple defendants. Although there are five defendants in this action, it does not follow from that fact alone that if one is liable all five are liable. Each defendant is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you find against any of the others. Unless otherwise stated, all instructions given to you govern the case as to each defendant.

* * * *

[Tr. 4957] Now, ladies and gentlemen, accompanying the verdict form are what we call special interrogatories. They are questions directed to you as a jury. They must be answered by you as a group. You are to answer these questions and return them with the verdict form.

* * * *

APPENDIX H

[*Special Interrogatories and Verdict Form*]

We, the jury in this action, unanimously find as follows:

1. Is the Pro-Life Action Network (PLAN) a group of people or organizations associated together for a common purpose?

   Yes ✓ No ___

2. Were the following Defendants associated with PLAN? (see Jury Instruction No. 20 for the definition of "associated with")

Joseph Scheidler	Yes ✓	No ___
Andrew Scholberg	Yes ✓	No ___
Timothy Murphy	Yes ✓	No ___
Pro-Life Action League	Yes ✓	No ___
Operation Rescue	Yes ✓	No ___

3. Did the following Defendants participate in the operation management of PLAN? (see Jury Instruction No. 21 for a definition of participation in operation or management)

Joseph Scheidler	Yes ✓	No ___
Andrew Scholberg	Yes ✓	No ___
Timothy Murphy	Yes ✓	No ___
Pro-Life Action League	Yes ✓	No ___
Operation Rescue	Yes ✓	No ___

4. Did any Defendant, or any other person associated with PLAN, commit any of the following acts?:

		Yes	Number of Acts	No
(a)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of federal law	✓	21	
(b)	Acts or threats involving extortion against any patient, prospective patient, doctor, nurse, or clinic employee, in violation of the law of any state	✓	25	
(c)	Threats of murder against a doctor, nurse, or clinic employee		0	✓
(d)	Attempt or conspiracy to do any of the acts listed above, even if the act was not actually carried out	✓	25	
(e)	Acts or threats of physical violence to any person or property	✓	4	
(f)	Travel across state lines, or the use of the mail or telephone, with intent to commit or facilitate an unlawful act, such as extortion, under state or federal law	✓	23	

(g)	Attempt to do an act described in (f) above, even if the act was not actually carried out	✓	23	
(h)	Causing another person to do an act described in (f) above		0	✓

5. Were at least two (2) of these acts committed during any ten-year period?

Yes ✓ No ____

6. If you answered "yes" to any item of 4(a) or 4(b), was your answer based solely blockades of clinic doors or sit-ins within clinics, without more?

Yes ____ No ✓

7. Did PLAN or persons associated with PLAN engage in a "pattern" of at least two of the acts that you found in Question 4 above? (see Jury Instruction No. 28 for the definition of "associated with")

Yes ✓ No ____

8. Did any of the acts that you found in Question 4 above affect interstate commerce? (see Jury Instruction No. 19 for the definition of interstate commerce)

Yes ✓ No ____

9. If any defendant or person associated with PLAN committed any two (2) acts described or listed above in question number 4 within any 10 year period, did those acts proximately cause injury to the business or property of the

following plaintiffs? (see Jury Instruction No. 28 for the definition of proximate cause)

The women represented by NOW:

Yes ✓ No ____

Delaware Women's Health Organization:

Yes ✓ No ____

Summit Women's Health Organization:

Yes ✓ No ____

If you answered "yes" to Questions 1, 5, 7 and 8, and if you found that at least two acts were committed in Question 4, and if you answered "yes" as to any Defendant(s) in Questions 2 and 3, you have found those Defendant(s) liable on Claim I, and you should proceed to the next question:

10. As to the Defendants whom you have found liable on Claim I, what amount will adequately compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization $ 54,471.28

Delaware Women's Health Organization $ 31,455.64

If you found all of the Defendants liable on Claim I, you need not proceed any further; simply go to the last page and sign and date the Verdict Form.

If you did not find all of the Defendants liable on Claim I, you should answer the following questions as to Claim II for any such Defendant(s):

11. Did the following Defendants combine or agree with one another or with others to operate PLAN through a pattern of acts illegal under RICO?

Joseph Scheidler	Yes ____	No ____
Andrew Scholberg	Yes ____	No ____
Timothy Murphy	Yes ____	No ____
Pro-Life Action League	Yes ____	No ____
Operation Rescue	Yes ____	No ____

12. As to the Defendant or Defendants whom you have found liable on Claim II, what amount will adequately compensate these Plaintiffs for their RICO injuries?

Summit Women's Health Organization $ _____

Delaware Women's Health Organization $ _____

Please now sign and date the verdict form and tell the bailiff that you have reached a verdict.

_____	_____
Date	Foreperson
_____	_____
Juror	Juror
_____	_____
Juror	Juror

Juror	Juror